IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
PORTLAND DIVISION

RHONDA W. WILCOX,	)	
	)	
Plaintiff,	)	No. 03:09-cv-06349-HU
	)	
vs.	)	
	)	
MICHAEL J. ASTRUE,	)	**FINDINGS AND RECOMMENDATION**
Commissioner of Social Security,	)	
	)	
Defendant.	)	

_____

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Hubel, United States Magistrate Judge:

The plaintiff Rhonda W. Wilcox seeks judicial review pursuant to 42 U.S.C. § 405(g) of the Commissioner's final decision denying her application for Disability Insurance ("DI") benefits under Title II of the Social Security Act, 42 U.S.C. § 1381 *et seq.* Wilcox argues the Administrative Law Judge ("ALJ") erred in weighing the evidence, and in concluding that Wilcox retains the ability to work. Dkt. #13.

I. PROCEDURAL BACKGROUND

Wilcox lives with her husband and two children in Eugene, Oregon. She initially alleged disability as of May 3, 2000, due to a "[b]ack condition; sciatic nerve damage; [and] muscle weakness." (A.R. 122) She protectively applied for DI benefits on April 27, 2004. (A.R. 108-10) Her application was denied initially and on reconsideration. (A.R. 40-42, 46-50, 58-59) She requested a hearing (A.R. 50), and a hearing was held before an ALJ on May 3, 2006. (A.R. 676-89) Wilcox was fifty years old at the time of the hearing. She asked that the hearing be continued to allow her to obtain representation. Her request was granted, and the next hearing was held on August 29, 2006 (A.R. 690-718). The ALJ determined that a consultative medical examination would be appropriate, so the hearing was adjourned, and then reconvened on March 13, 2007 (A.R. 719-56) At this third hearing, Wilcox amended her alleged onset date to October 1, 2005. (A.R. 722)

On July 26, 2007, the ALJ issued his decision, finding that although Wilcox suffers from severe impairments including "degenerative disc disease of the lumbar spine, obesity, and

affective disorder" (A.R. 26), and she is unable to return to any of her past work (A.R. 33), she retains the residual functional capacity to perform light work with certain restrictions. (A.R. 29; *see* A.R. 29-33) Wilcox requested review, and submitted additional evidence for consideration by the Appeals Council. (*See* A.R. 10) On October 7, 2009, the Appeals Council denied her request for review, making the ALJ's decision the final decision of the Commissioner.

Wilcox filed a timely Complaint in this court, requesting judicial review. Dkt. #2. Wilcox filed a brief in support of her claim, Dkt. #13, to which the Commissioner has responded, Dkt. #14, and Wilcox has filed a reply, Dkt. #15. The matter is now fully briefed. The undersigned submits the following Findings and Recommendation for disposition of the case pursuant to 28 U.S.C. § 636(b)(1)(B).

II. FACTUAL BACKGROUND

A. Summary of the Medical Evidence

Wilcox apparently sustained some type of on-the-job injury on August 4, 1999. (*See* A.R. 246) On October 15, 1999, Betty Berry, a representative of SAIF Corporation[1], completed a "Job Analysis" form regarding Wilcox's job. (A.R. 246-47) Berry indicated Wilcox was employed in the job of "[d]riving [a] bus on prescribed routes." (A.R. 246) The form is instructive here because it lists the job requirements for a bus driver; i.e., sitting 95% or more of

[1]"SAIF Corporation is Oregon's not-for-profit, state-chartered workers' compensation insurance company." http://www.saif.com/aboutsaif/aboutsaif.aspx (visited 06/06/11)

the day, and standing the remainder of the day; limited walking, just to and from the bus; minimal opportunity to change positions; no lifting or carrying; the need to operate a steering wheel, door controls, farebox, and transfer punch; the need to reach overhead, and to reach and handle seatbelts; infrequent sitting or squatting; minimal twisting; climbing of three to five steps to board the bus; no crawling; the need to use a pencil, transfer punch, route guide, computer, and key pad; and environmentally, exposure to exhaust fumes both in the bus, and outdoors while getting into and out of the bus. (R. 246-47)

Wilcox fell at work in late November or early December 1999, after "working a 19 hour day." (A.R. 382) She was off work for three weeks, returning to work part-time in early January 2000. Mattox L. Purvis, Jr., M.D. advised her to remain on part-time work for two additional weeks, and then she could return to full-time work with no extended duty. (*Id.*)

On May 3, 2000, Wilcox was driving a school bus when the bus was rear-ended by a passenger van. Wilcox was required to exert considerable pressure on the brakes in order to stop the bus. A seat from the bus ran into her, impacting the back of her right hip and the side of her right thigh. She immediately felt some low back pain, and a few hours later she started to feel pain in her right leg. She saw Kurt Brewster, M.D. at an urgent care facility, and he diagnosed her with "[l]umbar strain with associated musculoskeletal pain." (A.R. 381, 527) He opined her symptoms could be treated with only medications, and he prescribed Xanax for muscle relaxation, and Tylenol #3 and Ibuprofen for pain. (A.R. 527)

On May 6, 2000, Wilcox saw Dr. Purvis, requesting a work release. She thought she probably would be able to return to work the following Monday. She was ambulating without difficulty, and although she had some soreness, the doctor did not observe any bruising or soft tissue discoloration. (A.R. 381) Dr. Purvis gave her a work release indicating she could only drive for "up to 30 minutes" at a time, and she should not lift or bend. (A.R. 525)

On May 31, 2000, Dr. Purvis noted that Wilcox had attempted to return to work "but was only able to manage it for about 10 minutes before the pain in the right hip and buttock area went out of control again." (A.R. 380) He noted Wilcox would be unable to return to active driving at that time, and he wrote a work release for her to be off work for two weeks, and then "placed on alternative duty status 8 hours with 3 hours sitting, 3 hours standing and 2 hours walking." (*Id.*)

On June 12, 2000, Wilcox was seen at an occupational medicine clinic ("OM clinic") for evaluation. She complained of "right low back/right buttock/right inner thigh pain," and "pain with bending." (A.R. 596) She was referred to physical therapy for evaluation and treatment. (*Id.*)

Wilcox began physical therapy on June 14, 2000, on referral from Paul Panum, M.D. (A.R. 344-45) Wilcox's chief complaints consisted of "pain on the right side of the back, buttock and groin and the condition is unchanging, intermittent in the back, buttock, thigh." (A.R. 344) She reported that her condition worsened with "sitting, rising, bending, standing, also with lifting, cough, sneeze." (*Id.*) She had disturbed sleep two to three times each night, and her daily activities had been reduced by 30% due to her

symptoms. (*Id.*) Her rehabilitation potential was noted to be "[g]ood depending on confirmation of mechanical diagnosis, patient compliance, [and] response to treatment." (A.R. 345)

On June 16, 2000, Wilcox reported that she was doing home exercises ten times daily. Although the pain in her buttock and thigh was better and she was sleeping better, her back pain was worse. (A.R. 343) On June 19, 2000, Wilcox reported doing exercises seven times a day. She stated the exercises were "really helping." However, on June 18, 2000, she had been sitting on the floor, and when she got up, her pain level increased. The therapist instructed her "in lateral compartment techniques that immediately abolished hip and groin symptoms." (A.R. 342)

Wilcox was seen at the OM clinic for followup on June 19, 2000. She continued to have "persistent right low back/right hip pain in a sciatica distribution," and she was not sleeping well due to pain. (A.R. 595) She was directed to continue physical therapy. Notes indicate Wilcox was scheduled to return to work the next day, and she was given restrictions including a ten-pound lifting limit, minimized twisting and bending, and no prolonged sitting. (*Id.*)

On June 22, 2000, Wilcox reported to the physical therapist that she was exercising two to three times a day, with decreased walking. She stated the exercises relieved her symptoms, but they later returned. She was instructed in different techniques to use throughout the day. (A.R. 341) One June 26, 2000, she reported sleeping better and estimated her improvement at "about 30%." (A.R. 340) She stated sitting greatly increased her pain. Exercises relieved her symptoms, but they returned in about thirty

minutes. She was encouraged to continue "aggressive use of self treatment." (*Id.*)

Wilcox was seen at the OM clinic on June 26, 2000. She was somewhat improved, and was finding the physical therapy exercises a bit more comfortable. She still was unable to sit for any length of time without increased pain in her right lower back/right leg. She also was unable to stand for any length of time, and needed to be able to move about. She stated her back exercises would reduce her pain for about half an hour. Notes indicate Wilcox "should be able to return to modified work, 10 pounds lifting limit. Minimize twisting or bending. No driving at this time. Change positions frequently." (A.R. 594)

At Wilcox's June 27, 2000, physical therapy appointment, she reported significant improvement over the previous 24 hours. She had doubled the frequency of her exercises at work, and stated she felt better than she had in the past six weeks. (A.R. 339) Wilcox continued to report "doing very well" on June 30, 2000. (A.R. 338) On July 3, 2000, she reported doing her exercises six times a day, with increased standing and walking. She was sleeping better and had eliminated use of pain medications. She stated her pain was "much better," noting she had "only had 2 episodes of pain and the exercises eli[]minated it immediately." (A.R. 337)

Wilcox was seen at the OM clinic on July 6, 2000. She was having less difficulty with the physical therapy exercises, but some exercises continued to cause her pain. She was "somewhat upset and tearful and concerned about her job stability" due to her inability to drive a bus. (A.R. 593) She was released for modified work with no lifting, pushing, or pulling over fifteen

pounds; no driving or operating heavy equipment; and minimized twisting and bending. (*Id.*)

When Wilcox returned to physical therapy on July 7, 2000, she reported that her pain was worsening again due to "too much sitting on the buses." (A.R. 336) According to Wilcox, Dr. Panum had opined she was not ready to return to driving yet. She was directed to increase the frequency and duration of her exercises, and "[u]tilize better body mechanics and posture." (*Id.*) On July 12, 2000, Wilcox reported "making steady gains." (A.R. 335) Her pain generally was located in her back, and she noticed a marked difference when she did not sit for long periods. She stated she could sit comfortably for only thirty minutes, although she could tolerate up to forty-five minutes. She expressed "concern[] about the long term problems with sitting all day while driving." (*Id.*) The therapist noted:

> Patient improving as long as she limits her sitting tasks both in duration and frequency. This limitation may have some long term ramifications on returning to full time driving that requires long periods of uninterrupted sitting. Progression of return to driving activities would [require] short periods only with frequent task changes.

(*Id.*)

Wilcox was seen at the OM clinic on July 13, 2000, for followup. She was showing some improvement, and was released to modified work with a fifteen-pound lifting limit, minimized twisting and bending, and driving the bus for only two hours per day. (A.R. 592)

Wilcox reported improvement at her July 14 and 19, 2000, physical therapy sessions. (A.R. 333-34) On the 19th, she stated

Dr. Panum had "assigned [her] to 2 hours / day of driving." (A.R. 333) At the OM clinic on July 21, 2000, Wilcox stated she was "better." She was driving the bus two hours per day and that was going well for her. She had increased her walking, and she was able to exercise briefly at intervals during the time she was driving. She was released to drive "four hours per day with no other prolonged sitting work during the day and interrupting these four hours in two two-hour segments," with a ten-pound lifting limit. (A.R. 591)

On July 27, 2000, Wilcox reported to the physical therapist that she was "tolerating about 90 minutes of driving," broken up by standing/walking at stops. (A.R. 332) She was doing four hours of driving with a split shift, but noted she was not pain-free towards the end of her shift. (*Id.*) The therapist noted "some concerns about the complete resolution of this mechanical problem if she returns to driving full time." (*Id.*) She opined Wilcox might "need to be in a situation that combines driving and standing/ walking tasks daily," and she suggested Wilcox try "driving a split shift @ 3 hrs and 2 hours after her vacation." (*Id.*)

At the OM clinic on July 28, 2000, Wilcox complained of marked worsening of her symptoms that morning. She had been assigned to a different type of bus with a seat that was not well cushioned, and she had "developed low back worsening pain and burning discomfort into the buttocks and down both legs." (A.R. 590) Standing and stretching provided some relief. She was sent home with directions for bed rest. (*Id.*) On July 31, 2000, she was much improved but she exhibited "decreased range of motion compared prior to driving the bus." (A.R. 589) She was returned to

modified work with a ten-pound lifting limit; minimized twisting and bending; no driving a bus or heavy equipment, and no riding on the bus; and change of positions frequently. (*Id.*) Wilcox saw the physical therapist the same day and was advised to use "aggressive" self treatment over the next five days while she was on vacation. (A.R. 331)

When Wilcox returned from vacation, she was seen at the OM clinic on August 7, 2000, for recheck. Her pain was improved, and primarily centralized in her low back. She was released to return to "driving four hours a day in at least two split shifts," with "a driver's seat that is well cushioned and that does not bottom out." (A.R. 612)

Wilcox saw the physical therapist on August 7, 2000, and reported doing "much better than one week ago." (A.R. 320) Her leg symptoms were completely gone and her pain was "remaining in the back off to the right side." (*Id.*) She planned to bid for a split shift position for the fall. (*Id.*) She reported continuing steady progress at her physical therapy session on August 14, 2000, noting she would be sore after driving for two hours, but the pain would clear in about 30 minutes. (A.R. 329) The therapist anticipated Wilcox should "be able to tolerate an additional hour of driving within one week[.]" (*Id.*) She noted Wilcox's compliance with her treatment regimen was "excellent." (*Id.*)

Wilcox was seen at the OM clinic on August 16, 2000. She reportedly was "sore," and stated she was "working on a bus that require[d] her to be strapping in wheelchairs which require[d] more bending than usual. . . ." (A.R. 587) Otherwise, she was "tolerating the split shift well." (*Id.*) She was released to

increase her driving to five hours per day, broken into at least two shifts, with "a well cushioned seat." (*Id.*)

On August 22, 2000, Wilcox told the physical therapist she has been working a five-hour split shift for three days. She was "stiff on the right side" when she got up out of her seat. (A.R. 328) The therapist noted: "Although sitting tolerance is what is needed for this patient to tolerate her job, increasing sitting tolerance is not in the best long term interest of prevention for this patient's problem. She may need a long term combination of driving and other tasks." (*Id.*)

Wilcox was seen at the OM clinic on August 24, 2000. She was continuing to improve and was working five-hour shifts, split into three hours and two hours. She was released to drive six hours per day, still in split shifts. (A.R. 586)

Wilcox reported to the physical therapist on September 6, 2000, that she had bid on a new job that would require her to drive two hours in the morning and 5.5 hours in the evening. (A.R. 327) When she was seen at the OM clinic on September 8, 2000, she stated she continued to have "pain in both buttocks and more primarily into the right sciatic area." (A.R. 585) She was "doing split shift at six hours a day and then standing to answer the phone or sitting to answer the phone[.]" (*Id.*) Wilcox opined she would do just as well driving the bus on a split shift basis. She was released to return to work eight hours per day "as long as she is doing a split shift." (*Id.*)

Wilcox was seen for followup at the OM clinic on September 15, 2000. She was doing well working full time with the split shift, although she reported being fatigued by the end of the day. Notes

indicate, "With the current work status of split shift eight hours per day and 40 hours per day [sic] she is able to perform essentially the full function of her work, though, the split shift requirement is not a part of the usual work status, nor is the 50 hour per week a part of the full function for the organization." (A.R. 584)

At Wilcox's September 20, 2000, physical therapy session, she reported that she was tolerating the split shift of driving, but by the end of the week, she was experiencing increased pain. (A.R. 326) On September 25, 2000, she stated she was seeing a pattern to her pain. She tolerated driving from Monday through Wednesday, but on Thursday and Friday, she had "increased pain and difficulty tolerating driving." (A.R. 325) She also was "having many other personal issues" impacting her condition. (*Id.*) The therapist wanted to get Wilcox started on exercises in the pool. (*Id.*) A few days later, on September 29th, Wilcox reported her status was unchanged. She had not had time to begin the pool exercise program, but planned to do so when she returned from vacation. (A.R. 324) On October 10, 2000, Wilcox reported that she was doing "very well with the combination of activities [the therapist] designed." (A.R. 323)

Wilcox was seen at the OM clinic on October 16, 2000. She was doing the split shift "without difficulty." (A.R. 583) She had begun water therapy, which she indicated was improving her discomfort, and she continued to try to increase her activity level. (*Id.*)

At physical therapy on October 18, 2000, Wilcox stated the pool program was going well, but driving was "still somewhat

challenging." (A.R. 322) The therapist noted Wilcox's condition was stabilizing, and she should "be ready for discharge in 4 weeks." (*Id.*) When Wilcox returned for followup on October 20, 2000, she reported that she had no pain while she was in the pool. (A.R. 321) She reported "doing better" on October 30, 2000, with "some fluctuations in pain but generally managing well." (A.R. 320)

Wilcox returned to the OM clinic on November 22, 2000. She reported continued slow improvement "both in flexion and extension and tolerance at work." (A.R. 582) She was not fatiguing as rapidly, and was hopeful she could return to a regular eight-hour shift by February. Notes indicate she was not considered to be "medically stationary" yet for purposes of working a regular eight-hour shift, and she was directed to continue working the split shift. (*Id.*)

Wilcox next saw the physical therapist on November 28, 2000. She stated she was "doing OK in [her] back but having some slight achiness in [her] right leg pain." (A.R. 319) She was still finding the split shift somewhat difficult to tolerate. (*Id.*) The therapist suspected Wilcox was "having a mild flare-up with discogenic pain," and she therefore did not discharge Wilcox, but instead directed her to engage in aggressive self-treatment for the next week. (*Id.*)

Wilcox saw Dr. Purvis on December 4, 2000. His notes indicate Wilcox was "very anxious and upset about her recurring spasms in the legs and sciatica type pain and inability to ambulate[.]" (A.R. 379) She also was noted to be "tearful at times, [and] depressed." (*Id.*) The doctor prescribed an antidepressant, refilled Wilcox's

blood pressure medication, and directed her to return for followup in about three weeks. (*Id.*)

Wilcox's back pain was better by December 5, 2000, but she was still having achiness in her leg. Physical therapy notes indicate her status was "waxing and waning." (A.R. 318) Her status remained unchanged on December 11, 2000. (A.R. 317) On December 13, 2000, she was seen at the OM clinic. She complained of continuing pain and discomfort, and notes indicate she seemed to be "plateauing without any persistent improvement." (A.R. 609) Sitting and walking aggravated her pain. An MRI was scheduled, and she was directed to remain on the split shift. (*Id.*)

Wilcox missed her scheduled physical therapy appointment on December 26, 2000. (A.R. 316) She was seen at the OM clinic on December 27, 2000. She continued to have persistent pain despite physical therapy, and recently had been having difficulty walking. She wanted to return to a regular, full shift so she could "use some muscle relaxant pain medication at night time[.]" (A.R. 581) She was looking for a shift that would allow her to get of the bus and do stretching exercises during the day. On examination, she had "excellent full flexion and extension with straight leg raising on the right at 90 degrees." (*Id.*) She was directed to limit her work to 40 hours per week, and to continue doing exercises during the day. (*Id.*)

Wilcox saw Dr. Purvis on December 29, 2000. Notes indicate her back was improving slowly. Although she "apparently now [has] a herniated disc at L4-5," she was "certainly not eager to consider surgery." (A.R. 379) She requested and received a lower dose of the antidepressant. (*Id.*)

When Wilcox returned to physical therapy on January 5, 2001, she reported that symptoms in her buttock, thigh, and calf were worse. She had decreased her walking. She stated a recent MRI confirmed the presence of a disc problem. She planned to try to get off of the split shift and increase her walking. Pain in her right leg continued to come and go, and was not responding to her exercises. The therapist suspected "irreducible derangement." (A.R. 315) She advised Wilcox to walk only if her leg pain did not get worse. (*Id.*)

On January 17, 2001, Wilcox reported to the physical therapist that her leg symptoms were not improving. Her pain was relieved only "by some of the exercise and use of the water." (A.R. 314) The therapist noted Wilcox might "not be a candidate for further mechanical treatment." (*Id.*) Her assessment was "[u]nstable derangement, probably not reducible [at] this juncture." (*Id.*)

Wilcox saw Dr. Purvis on January 19, 2001, reporting that her back pain was improving gradually. (A.R. 379) On January 22, 2001, the physical therapist noted Wilcox should be assessed by a doctor, and Wilcox indicated she was "ready to have a neurosurgery consult to gain more information." (A.R. 313) She was directed to continue self treatment as needed for her comfort. (*Id.*)

Wilcox went to the OM clinic for followup on January 30, 2001. She stated she had "good days and bad days, some . . . more difficult than others." (A.R. 606) She was starting a new route at work, driving eight hours without breaks, which Wilcox thought would be easier for her because the split shift required "longer hours at work and also driving to and from work twice." (*Id.*) An MRI scan showed "a large central disk herniation, minimally

eccentric to the left L4-5." (*Id.*) Her status was discussed with her at length, including "her very patient tolerance of the problem, and very faithful physical therapy with no consistent improvement." (*Id.*) She was directed to schedule an appointment with a surgeon to discuss surgical options. (*Id.*)

On February 12, 2001, Wilcox saw Catherine J. Gallo, M.D. for a surgical consultation. Dr. Gallo noted Wilcox had undergone a course of physical therapy, originally receiving good results, but with diminishing effects over time. When her pain became constant, she obtained an MRI, and then was referred to the neurosurgeon for consultation. (A.R. 234)

Wilcox described her pain as consisting of "a constant ache in the low back with some burning and stabbing pain on the right side," and aching in her right leg with "some severe burning in the lateral thigh and calf." (*Id.*) She denied numbness and tingling, but noted her right leg seemed to be weaker overall and she reported some trouble walking. She stated she was still driving a school bus, but "sitting for long stretches of time exacerbate[d] the pain." (*Id.*)

Dr. Gallo observed Wilcox to be a "[w]ell-developed, well-nourished female in no acute distress," with a height of 5'5" and weight of 260 pounds. The doctor noted a "large central disc herniation at L4/5" (A.R. 236), and she recommended a lumbar microdiscectomy, given Wilcox's lack of improvement with conservative management over time. The doctor cautioned Wilcox that her weight increased the risk that surgery would not be successful in relieving her pain, and also would increase the risk of

complications. Wilcox was directed to think things over and call the doctor when she had made a decision. (*Id.*)

Wilcox was seen at the OM clinic on February 20, 2001, "for recheck of her herniated lumbar disk." (A.R. 580) Wilcox wanted to "continue her current work status which is a regular route with essentially no limitations," and attempt to lose some weight prior to surgery. (*Id.*) She was doing home exercises, and continued to walk daily, though she noted she was "slower than . . . in the past." (*Id.*) She was directed to continue her current work status, and continue doing her exercises. (*Id.*)

Wilcox was seen in the emergency room on March 15, 2001, for an acute exacerbation of her back pain, which she stated was "one of the worse exacerbations . . . since the original injury." (A.R. 603) She was treated with Vicodin, put on two days of bed rest, and then directed to "do some limited duty work." (*Id.*)

Wilcox returned to the OM clinic on Tuesday, March 20, 2001, for followup. She reported spending most of her time at home in bed since her trip to the E.R. When she was up for any length of time, she would have "spasm in her right low back, burning discomfort, and spasm down into the posterior thigh of the right leg." (A.R. 610) She was noted to be very tearful. She was assessed as "unable to work at this time," and was directed to follow up with Dr. Gallo. (*Id.*)

Wilcox saw Dr. Gallo for followup on March 22, 2001. She reported that over the previous two weeks, her pain had been "much worse," and she had experienced some episodes of urinary and bowel incontinence and diarrhea. The doctor recommended that Wilcox proceed with the surgery in the near future, and Wilcox agreed to

have the procedure done the following week as an outpatient. Dr. Gallo also noted it was unclear whether Wilcox would be able to return to driving a school bus. (A.R. 233)

Wilcox underwent a right L/4-5 microlumbar discectomy on March 27, 2001. (A.R. 240-41) She was discharged with Percocet for pain, but soon began having itching in her arms and thought her throat felt hot and red. She called Dr. Gallo, who changed her medication to Vicodin. She began having similar symptoms and "felt quite anxious," but by the time she arrived at the E.R., all of her symptoms had resolved. The doctor opined her symptoms might be anxiety related, as he could identify no objective findings to account for her symptoms. She wanted "to just take Tylenol and Motrin," and discontinue any other pain medications, but she also asked for something to "help calm her nerves." (A.R. 389) She was given a prescription for Xanax, and directed to follow up with Dr. Purvis and Dr. Gallo as soon as possible. (A.R. 390)

When Wilcox saw Dr. Gallo for followup on April 16, 2001, she was "not having much in the way of back or leg pain." (*Id.*) Her bladder function was "much improved," and she had not had any more episodes of bowel incontinence. Dr. Gallo released her "to light duty doing survey work with no lifting [over ten pounds]." (*Id.*) She also prescribed a course of physical therapy. (*Id.*)

Wilcox saw Dr. Purvis on April 17, 2001. She stated her back condition was "much improved" since her surgery. (A.R. 378)

Wilcox saw a Physician's Assistant at Dr. Gallo's office on April 18, 2001, with "concerns regarding wound healing and her return to work status." (A.R. 232) Wilcox's daughter had noticed redness and irritation at the incision site, and Wilcox reported a

stinging sensation at the site when she used soap. The P.A. opined the irritation was "just some inflammation from sitting or rubbing against her clothing." (*Id.*) The P.A. recommended dry heat packs and a protective dressing. Wilcox also indicated "she was expected to return to work this week, but [could] not stand or sit for longer than fifteen minutes with[]out experiencing discomfort," and her job required "prolonged standing and sitting." (*Id.*) The P.A. extended Wilcox's time off work for two additional weeks. (*Id.*; A.R. 242)

Wilcox was seen at the OM clinic on April 20, 2001, for recheck of her low back incision. There was some hardness at the incision site, but no evidence of a cyst. She was released to work on a modified schedule, "four hours per day, 5 pound lifting limit. Minimize twisting and bending. Sitting as needed. Changing positions frequently. No driving a bus at this time." (A.R. 579)

Wilcox returned to see the physical therapist on April 26, 2001. (R. 310-12) Wilcox's chief complaints included "low back and intermittent right leg achiness and the condition is improving, intermittent in the back, buttock, thigh." (A.R. 310) Wilcox's goal was to return to full-time work, and prevent any recurrence. She stated her symptoms worsened with sitting and bending as the day progressed. She was working part-time with restrictions and modified duties including no repetitive lifting, bending, or sustained positions, and lifting/carrying limited to five pounds. (*Id.*) She was scheduled for "2 visits, in 2 weeks to determine appropriateness for mechanical therapy. 10 additional visits in 6 additional weeks if responding to treatment." (*Id.*)

Wilcox was seen at the OM clinic on April 30, 2001. She was feeling better, and was released to work six hours per day, but still no bus driving. (A.R. 578) On May 11, 2001, she reported continued improvement. She was released to work eight hours per day, but advised to "avoid driving for an additional week." (A.R. 577) On May 21, 2001, she was released "to being on the bus two hours a day for the week of 05/21, four hours/day for the week of 05/28." (A.R. 576)

Wilcox did well until May 23, 2001, when she went to the OM clinic complaining of an acute lumbar spasm. She had ridden in a car for work and "noted gradually increasing low back pain just to the right of the diskectomy scar and persisting in the right," with no leg radiation. (A.R. 575) She also had some leakage of the bladder. She had left work early the day before. When she tried to drive to the clinic, she had to stop due to muscle spasms, so she ended up taking the bus, standing the entire distance of the trip. When she arrived at the clinic, she asked to lie down. She was diagnosed with an acute lumbar spasm postoperatively, and she was directed "to be home at bedrest, following her physical therapy appointment [scheduled for the same day]." (*Id.*)

At physical therapy, Wilcox reported that the day before, she had gotten into and out of a van repeatedly, causing a flare-up of her back and leg pain. She described her leg pain as "intermittent with extending [her] leg forward while driving or striding out." (A.R. 306) Wilcox was instructed in therapeutic techniques, and she left the office "symptom free" in her leg. She was expected to achieve "full resolution back to previous status in one week." (*Id.*)

Wilcox returned to the OM clinic for followup on May 29, 2001. She stated she was "comfortable only when walking about for short periods of time and then lying down, otherwise, she [had] spasm extending to the right and down the right leg and into the right calf." (A.R. 574) Wilcox stated she had "been extremely depressed at home and frequently very tearful and crying." (*Id.*) She was advised to follow up with Dr. Gallo. Notes indicated, "At this time, I do not feel the patient is able to work, as she is uncomfortable being up and around. I am concerned about the postop status of this individual and may consider discussing with Dr. Gallo for either further imaging or the possibility also of a rehab program, work hardening." (*Id.*)

At her physical therapy session on June 1, 2001, Wilcox reported some improvement, but she still had achiness in her leg. She had tried to walk, but reported that "after about 4 blocks the leg pain gets worse." (A.R. 305) She was instructed to walk for five minutes every two hours, followed by extension exercises. (*Id.*)

Wilcox saw Dr. Gallo for followup on June 4, 2001. She reportedly had been "doing well at light duty until about 2 weeks ago when she had an exacerbation of back pain after getting in and out of a van at work over the course of about 3 hrs." (*Id.*) She experienced frequent muscle spasms after the incident, and Paul Panum, M.D., her family doctor, took her off work. Wilcox stated she did not think she could return to work at her current pain level. Dr. Gallo ordered a repeat MRI, noting if it did not show evidence of recurrent disc herniation, then Dr. Panum would "try to coordinate her occupational issues as it seems it will be quite a

while before she gets back to her regular job." (*Id.*) She was given a continued work release until her next evaluation. (A.R. 243)

Wilcox returned to physical therapy on June 6, 2001. She reportedly was doing better since her last visit, but still had occasional achiness in her leg. (A.R. 303) The therapist "strongly suspect[ed] derangement [at] L5 that was a D5 and is now a D3." (*Id.*) By June 12, 2001, Wilcox had been able to increase her walking to sixteen blocks. She was "feeling better, but sitting [was] still a problem." (A.R. 302)

Dr. Gallo saw Wilcox again on June 18, 2001. She noted Wilcox's repeat MRI showed "a huge right L4/5 disc herniation with nerve root compression and canal stenosis." (A.R. 231; *see* A.R. 244) Wilcox reported ongoing pain, and she requested another discectomy. The doctor told Wilcox "that if she reherniate[d] again she [would] need arthrodesis." (*Id.*) Wilcox was given a work release "until next evaluation." (A.R. 245)

Wilcox saw the physical therapist on June 21, 2001. She had reduced her walking and generally, she was "doing better." (A.R. 301) She stated Dr. Gallo "wants to do surgery again," but she did "not want surgery just yet," until she could obtain a second opinion from another surgeon. (*Id.*) On June 27, 2001, Wilcox reported that she had been walking more over the previous five days, and her right leg was "much better." (A.R. 300) She reported continued improvement on July 6, 2001, but noted she was "still only tolerating about 5 minutes of sitting before [her] back [went] into spasm." (A.R. 299) By July 13, 2001, she had increased her walking and home activities. She felt she was moving

better with less guarding, but she still could only sit for five minutes at a time. She felt her leg symptoms were improving. (A.R. 296)

On July 13, 2001, Wilcox was seen at the OM clinic for followup of her second herniation. She was unable to work, or even to sit, stand, or be up and about for any period of time. An independent medical examination was scheduled, and she was directed to follow up after that examination. (A.R. 573)

Wilcox saw Dr. Purvis on July 13, 2001, for general followup. She reported that she was under ongoing evaluation regarding another herniated disc, and the doctor noted another operation likely was indicated. (A.R. 378)

Wilcox tried physical therapy at the pool again, but reported to the physical therapist on July 20, 2001, that she had been "unable to tolerate the extended position." (A.R. 298) The therapist noted Wilcox was "[b]eginning to plateau," and she "may need further intervention." (*Id.*)

On July 23, 2001, at the request of SAIF, Wilcox saw David J. Silver, M.D. for a second opinion regarding her course of treatment. (A.R. 529-30) He recommended a "[r]epeat micro-diskectomy right L4-5." (A.R. 530) Wilcox wanted to delay the surgery until she could lose some weight, but he recommended she go forward with surgery immediately, "given the size of this fragment and her current disability." (*Id.*)

Wilcox returned to the OM clinic on July 27, 2001. She was awaiting approval for a second discectomy. She currently was unable to work. (A.R. 570)

When Wilcox saw the physical therapist on July 31, 2001, she reported that she was scheduled for surgery the following week. (A.R. 295) The therapist noted Wilcox had "shown excellent compliance with self treatment and preventative measures." (*Id.*)

Wilcox was seen at the OM clinic on August 3, 2001. She still had difficulty being up and about, and noted she was scheduled for surgery in the near future. (A.R. 569) She underwent a repeat L4/L5 discectomy on August 7, 2001. (A.R. 238-39) She returned to see the physical therapist on August 15, 2001, stating she had done very well after her surgery until August 14th, when she "turned funny in bed . . . [and] had some sharp pain[.]" (A.R. 294) She had improved somewhat since this incident. She was instructed in proper body mechanics for various movements. (*Id.*) When she returned on August 28, 2001, she reported "having some leg spasms," although she was walking three times daily, once for 20 minutes and twice for 10 minutes. (A.R. 293)

Wilcox saw Alexis Norelle, M.D. for followup of her surgery on September 4, 2001. Her symptoms had improved somewhat, although she continued to report "some pain in the posterior leg and groin[.]" (A.R. 230) Wilcox stated the pain was "more like a cramp than a sharp pain," and it worsened with prolonged standing or sitting. She was undergoing physical therapy and receiving some benefit from that, and was taking Aleve as needed for pain. She was directed to continue with the physical therapy. (*Id.*) She was given a work release until her next evaluation. (A.R. 229) She saw the physical therapist the same day, and noted she was "having some trouble walking greater than 15 minutes [at] one time," which

caused her legs to "get very achy." (A.R. 292) She was advised to increase her activity level. (*Id.*)

The next day, Wilcox was seen in the emergency room with complaints of "[a]nxiety, tingling and palpitations." (A.R. 386) She was noted to be anxious, and stated her symptoms had been occurring since a death in the family a couple of weeks earlier. The doctor opined that her symptoms were anxiety-related. He restarted her on an antidepressant, which she recently had discontinued, and also prescribed Xanax for her anxiety. (A.R. 387)

On September 10, 2001, Wilcox and her husband saw Dr. Purvis. Wilcox was noted to be "distressed, anxious and tearful," and she complained of a "[l]ong list of quality of life issues, mostly related to her recurring back pain, her lack of complete response to back surgery and her long-standing chronic anxiety and depression condition." (A.R. 377) Dr. Purvis frankly told her that to be free of back pain and joint problems, she would have to "lose about 100 [pounds]." (*Id.*) He also noted she might need to see a psychiatrist for her depression and chronic anxiety.[2] The doctor suggested the possibility of gastric plication surgery. (*Id.*)

On September 11 and 18, 2001, Wilcox saw the physical therapist and reported gradual improvement. She could walk for about twenty minutes at a time. Although her leg pain would increase with walking, it would improve when she stopped. She also

[2]Wilcox testified she made attempts to try to find a psychiatrist, but never ended up seeing anyone. (A.R. 701-02)

could tolerate sitting for up to twenty minutes at a time. (A.R. 290-91)

On October 2, 2001, Betty Berry from SAIF Corporation requested job restrictions from the physical therapist. She listed possible alternate duty assignments including clipping newspaper articles, making photocopies, verifying and proofing documents for "Braille projects," and proofreading bus route snow-and-ice schedules. (A.R. 286-87) She asked whether Wilcox "could drive a car to a location and count passengers getting off and on buses." (A.R. 287) She noted benches were at the bus stops and Wilcox could sit and stand at will. (*Id.*) Berry added, on October 3, 2001, that Wilcox's employer was "ready to provide modified work just as soon as she is released." (A.R. 289)

Berry proposed a job for Wilcox doing "survey work." The job duties were described as follows: "Employee will be stationed at various locations in the Eugene/Springfield area and will gather & record data. The heaviest item to be lifted is a clipboard. This position allows the flexibility to sit, stand and move around as needed." (A.R. 288; *see* A.R. 289) The job would require lifting, carrying, pushing, and pulling of one pound occasionally; bending and twisting about 10% of the time; walking on level surfaces occasionally; climbing three to four stairs occasionally; reaching above the shoulder about 15% of the time; frequent, repetitive use of the arms, wrists, and hands; occasional operation of foot controls; and occasional exposure to heat, cold, dust, noise, and the like. (A.R. 288)

The physical therapist indicated Wilcox could be released for these job duties beginning October 15, 2001, with the following restrictions:

> Additional specific recommendations:
> (1) should be able to tolerate some survey work at one location as long as she does not get in and out of an auto several times in a shift, [and] changes positions as follows:
> • no standing [over] 10-15 min @ a time
> • no sitting [over] 10-15 min @ a time
> • walking up to 30 min only
> • lifting up to 10#, no repetitive bending
> • still has difficulty with stairs on a bus
> (2) Recommend beginning [at] 3 hrs/day for 3 wks, then 4 hrs/day for 3 wks, then 6 hrs/day for 3 wks if continuing to improve.

(A.R. 287)

Wilcox saw the physical therapist on October 3, 2001, and reported that she was "progressing nicely." (A.R. 285) She was tolerating more activities slowly and agreed she could return to work with some restrictions. (*Id.*)

Wilcox saw Dr. Gallo on October 8, 2001. She reported "marked improvement over the last couple of weeks." (A.R. 230) Although she continued to have some back and leg pain, she stated it was much better than before the surgery, and she thought she could go back to light duty work. Dr. Gallo gave her a work release for light duty work, and directed Wilcox to continue with the physical therapy. (*Id.*)

Wilcox next saw the physical therapist on October 18, 2001. She stated she was "doing OK, working 3 hours/day[.]" (A.R. 283) Her leg was "very achy after this shift, but [did] not remain worse for too long." (*Id.*) On October 23, 2001, she reported that her stamina was increasing slowly. Her leg continued to be very achy at times. She was instructed in some new exercises. (A.R. 282)

On October 30, 2001, Wilcox stated the new exercises were working well and had not aggravated her symptoms. (A.R. 281)

Wilcox saw Dr. Purvis on November 6, 2001, for followup of her hypertension. She had begun exercising and had lost six or seven pounds since her last visit. (A.R. 377)

When Wilcox saw the physical therapist on November 7, 2001, she reported that she had increased her walking to "50-60 minutes daily." (A.R. 280) Her leg pain increased by the end of the walk but did not remain worse. (*Id.*) The therapist noted Wilcox was "[r]eady to increase work hours per original recommendation." (*Id.*) She saw the therapist again on November 14, 2001, reporting that she was walking ten to fifteen miles per week. She was working four hours per day and was tolerating it well, but feeling fatigued. The therapist noted Wilcox might need to remain at six hours per day of work for four to six weeks before she could increase to eight hours per day. Her previous restrictions for bending, lifting, and changing positions would need to continue. (A.R. 279)

Wilcox continued to report improvement at her next followup with Dr. Gallo, on November 19, 2001. She stated her back and leg pain were "much better," and she was able to work light duty for four hours per day. She planned to return to full-time work "over the next several weeks," and the doctor "anticipate[d] closure at light/medium duty in 2-3 months." (*Id.*) She noted Wilcox would have a Physical Capacity Evaluation (PCE) "and inclinometer evaluation" before her case was closed. (*Id.*)

Wilcox saw Dr. Purvis on November 20, 2001, for followup of her hypertension. She was noted to be "very anxious" and "very

tearful." (A.R. 376) She talked at length about emotional, physical, and sexual abuse that she had endured from her father, and Dr. Purvis again suggested counseling, to which Wilcox was "quite receptive." (*Id.*) He recommended a counselor for her to see. (*Id.*)

Wilcox called Dr. Purvis on November 27, 2001, complaining of knee pain. She wondered if she could have "gout" in her knees. He advised her to use Ibuprofen until he could see her and obtain a uric acid level. (*Id.*) When Wilcox next saw the physical therapist, on November 28, 2001, she stated she was "doing fairly well," but she had been experiencing knee pain that was limiting her walking somewhat. (A.R. 278)

Wilcox saw Dr. Purvis on December 4, 2001, reporting that she was "generally stable and doing well," with "[n]o new complaints or problems at this time." (A.R. 375) On December 5, 2001, Wilcox reported to the physical therapist that she had not yet been able to increase her work to six hours per day because "forms [had] not been returned to work yet[.]" (A.R. 277) She stated she was "tolerating the activities that [she had] been given [at] work." (*Id.*)

Wilcox was seen in the emergency room on December 16, 2001, complaining of rapid heartbeat. Her history was noted to be "[s]ignificant for distress and anxiety reactions" and "[h]ypertension." (A.R. 384) She stated she had been "under a lot of stress lately because of her back surgeries and pain." She had been unable to work as a bus driver and had learned that day that her employer was filling her position and planning to retrain her for a different position. An EKG was normal, and the doctor opined

Wilcox's symptoms were "anxiety provoked." (A.R. 385) He advised her follow up with Dr. Purvis. (*Id.*)

On December 17, 2001, Wilcox told the physical therapist she was having good days and bad days. She was walking two miles every day and doing her exercises once or twice a day. She stated, "I am not sure I could tolerate more than 6 hours/day." (A.R. 276) The therapist planned to have Wilcox begin some "light bending, lifting and carrying activities in the gym, [and] some work simulation." (*Id.*) By January 3, 2002, she was doing her exercises twice a day, and she had increased her sitting to forty minutes at a time. Her leg symptoms would begin after one mile of walking. "[L]eg strengthening exercises in standing [were] easier. Standing limits remain[ed] at 20 minutes." (A.R. 275) Notes indicate Wilcox might be ready to increase her lifting weight limit to five pounds. (*Id.*) A PCE was scheduled for February 4, 2002. (*Id.*)

Wilcox saw Dr. Purvis on January 15, 2002. She indicated she had been "under tremendous stress over the past two weeks, [because] all three of her brothers [had] been in crisis of one sort or another and one [had] died." (A.R. 375) She was not driving a bus, but was doing office work for the bus company. Her medications were continued without change. (*Id.*)

On January 18, 2002, Wilcox reported to the physical therapist that she was "doing pretty well with the work simulation activities[.]" (A.R. 273) She continued to have right leg pain "with too much activity." (*Id.*) Notes indicate she was "ready for 10# progression." (*Id.*) On January 24, 2002, Wilcox reported a "minor flare up from the lifting activities" she had done the previous week, but she was "feeling much better" and was walking over two

miles a day. (A.R. 272) The therapist planned to increase her work simulation to twelve-to-fifteen pounds. (*Id.*) On January 31, 2002, Wilcox reported that she had not had increased symptoms after her last sessions and she was "doing better." (A.R. 271)

On February 4, 2002, Wilcox underwent a three-hour Functional Capacity Evaluation. (A.R. 261-70) She tolerated the evaluation "fairly well," and "demonstrated appropr[i]ate posture and position changes as needed during the exam as a safety measure." (A.R. 262) Her sitting tolerance continued to be limited, and she had difficulty with stooping and squatting, all of which were noted to be "required tasks listed in her bus operator job analysis." (*Id.*) The therapist noted Wilcox's job required "performance at the Light/Med[ium] physical demand level," while Wilcox "demonstrated the ability to perform at the Light physical demand level[.]" (*Id.*) The FCE results indicated Wilcox could lift and stand occasionally; walk, sit, carry, kneel, crawl, reach, and handle frequently; and push or pull constantly. (*Id.*)

Dr. Gallo conducted a detailed closing exam of Wilcox on February 21, 2002. (A.R. 227-28) She noted Wilcox had "done fairly well with good relief of the severe back and leg pain and the urinary symptoms she was having prior to her surgeries." (A.R. 227) Wilcox continued to report "some mechanical back pa[i]n and a pulling sensation down the right leg when she [bent] or lift[ed] too much." (*Id.*) The doctor noted Wilcox's PCE put her at the light duty level, and Wilcox's current job was at the light/medium duty level. She noted it was unclear whether Wilcox's employer could "modify her job in order to accommodate her limitations." (*Id.*)

Wilcox's lumbar ranges of motion were assessed using an inclinometer. She demonstrated 15 degrees of extension (with 25 degrees being normal), 15 degrees of flexion (with 60 degrees being normal), 23 degrees of left bending and 21 degrees of right bending (with 25 degrees being normal for each side), and left straight-leg-raising of 90 degrees and right straight-leg-raising of 85 degrees (with 80 to 90 degrees being normal for each side). (*Id.*) Wilcox's motor exam was normal, with no atrophy or fasciculations noted. Her sensory exam also was normal, with sensation in the soles of her feet intact bilaterally. (*Id.*) She had somewhat impaired reflexes of her knees and ankles. (A.R. 228) Dr. Gallo reached the following conclusions from Wilcox's exam:

> I think the patient is medically stationary at this point and capable of light duty work, full-time, with the following permanent restrictions: occasional lifting up to 20 lbs, frequent lifting up to 10 lbs, no repetitive bending or twisting at the waist, no sitting for over 30 minutes without ability to change position. The patient is being returned to her primary care physician for ongoing care. I will be happy to see the patient back upon referral as deemed appropriate by her primary care physician at any time in the future.

Id.

Wilcox was seen at the OM clinic on March 14, 2002, "to review her current status." (A.R. 567) She stated Dr. Gallo had released her to work with permanent limitations of "occasional lifting up to 20 pounds, frequent lifting up to 10, no repetitive bending or twisting and no sitting over 30 minutes without the ability to change position." (A.R. 567) She also stated the physical therapist had released her to light work, and opined that bus driving would be a light/medium job. The OM clinic opined that

Wilcox "should not return to bus driving" due to "significant risk of re-injury of her back should she be in a bus driver position for any prolonged period of time." (*Id.*)

Wilcox saw Dr. Purvis on April 16, 2002. She stated she was losing her job as a bus driver, and she had applied to SAIF for a vocational evaluation and rehabilitation training. The doctor opined this was "probably the correct decision as I think bus driving aggravates her back and leg problem." (A.R. 375) He noted Wilcox's blood pressure would go up whenever she got anxious or upset. (*Id.*) He further indicated his support for Wilcox's application for disability, indicating it "could be a very positive life experience for her ultimately." (A.R. 374) He also noted Wilcox was "making diligent effort to increase her exercise and activity level and reduce her calorie intake." (*Id.*)

Wilcox saw Dr. Purvis for followup on August 9, 2002. Wilcox opined her blood pressure medication was contributing to her anxiety, and was interfering with her ability to exercise. She and the doctor agreed to try tapering her dose downward. The downward taper was continued the next month, and the medication was discontinued by her next followup on November 25, 2002. (A.R. 373-74) Her blood pressures at that time were noted to be excellent. (A.R. 373) Wilcox stated she was in school, "working on becoming a teacher." (*Id.*)

Wilcox saw Dr. Purvis on March 17, 2003, for followup of her blood pressure. Notes indicate she was "no longer losing weight actively," and her weight at that time was 261 pounds. (A.R. 373) They agreed to try a different blood pressure medication because

the doctor did not feel Wilcox's blood pressure was well controlled. (*Id.*)

On April 7, 2003, Wilcox saw Dr. Purvis and reported that she was "generally stable and doing well." (A.R. 372) She was planning a move to "a much less stressful environment." (*Id.*) By her next appointment, on July 9, 2003, she had "moved out in the country" and was "raising chickens with 29 in her flock." (A.R. 372) She generally reported "enjoying life, working diligently on weight loss," and her weight was down to 255 pounds. (*Id.*)

On October 24, 2003, Wilcox reported to Dr. Purvis that she was still in school, "working hard with her lessons and happy and feeling well about her progress." (A.R. 371) Her back had "improved considerably with her less active lifestyle," and her blood pressures had been excellent. She was advised to get more exercise as her weight continued to be a problem. (*Id.*)

Wilcox saw Dr. Purvis on January 23, 2004, and reported that she had fallen down at school on January 8, 2004, injuring her left knee. She had used crutches for a few days but was no longer using them, and her pain was subsiding. The doctor noted Wilcox's knee appeared intact with no effusion, crepitation, or other problems, and she walked without a limp. He diagnosed a recent left knee sprain "with improvement." (A.R. 371) He prescribed Celebrex 100 mg twice daily for ten days "to accelerate her recovery." (*Id.*)

X-rays of Wilcox's left knee, taken on February 2, 2004, showed "[o]steoarthritic changes . . . in all three compartments, especially severe in the patellofemoral compartment." (A.R. 358) The radiologist's conclusion was "Significant osteoarthritic change." *Id.*

Wilcox saw Dr. Purvis on February 7, 2004. She stated she had fallen again and "injured her right knee again[.]"[3] (A.R. 370) X-rays had not shown any fracture and her knee was improving. Notes indicate her blood pressure was "totally unacceptable today" at 200/120, and the doctor started her on a different medication. (*Id.*)

Wilcox saw Dr. Panum on February 13, 2004. The doctor noted the following "Interval History of Present Injury":

> [Wilcox] is a patient who is well-known to me from a previous back injury, two laminectomies, and subsequent permanent partial disability. I do not have her old records with me at this time. She states that she has been doing reasonably well with having good days and bad days, persistent pain into the legs, and sometimes having spasms in the left leg. she states that at her last visit with Dr. Gallo, she was told that this is as good as it gets, that she would have good days and bad days, and that she could expect to have left leg problems, as well as right leg problems. In September 2003, she made a trip to Portland for a relative's wedding and on the way back, she had increased pain and discomfort. She stopped numerous times to try and improve the back situation, doing exercises as previously recommended by the physical therapist. Her back and legs both ached badly on and off throughout the fall of 2003, and she had what she felt to be more bad days, but she continued to walk one to three miles per day, she continued to go to school, and she continued to do exercises as she had been instructed. Around the first part of December 2003, her left leg began aching badly and there were some cold days that she did not walk in her neighborhood. During Christmas vacation from school, she started getting her crutches out on most days because of spasms in the left leg. She apparently had company over Christmas and felt that she was, most of the

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[3]This apparently was a scrivener's error in the doctor's notes. Wilcox injured her left knee on both occasions, and x-rays were taken of her left knee, not her right knee. (*See* A.R. 358)

> time, immobilized because of the low back pain and spasms in the leg. She returned to school on January 8, 2004, following a snow delay, and on the first day of her practicum at Meadow View Schools, she followed 29 students out of one door over wet sidewalks and into the door of the hallway that was horizontal and was carpeted. There was a mat on top to wipe feet. In the hallway straight ahead the floor was tiled. All 29 students, she says, walked ahead of her. She stepped onto the tile floor and down she went. She feels that this was because her leg had given way. She says that she has had difficulty with that leg before. Two weeks ago, approximately two weeks before her visit today, 02/13/04, she said that she fell getting out of her tub at home. She felt that things had been going well, had no problems, and then suddenly the left leg gave way. She presents because of increased discomfort in the left leg, and spasms and pain in the left low back.

(A.R. 355)

On examination, the doctor noted Wilcox had decreased reflexes bilaterally. She had good flexion, extension, and lateral bending, and straight-leg-raising was positive at 90 degrees on the left and negative on the right. (A.R. 355-56) Dr. Panum prescribed a short course of physical therapy, which was approved by the workers' compensation carrier. (A.R. 356)

Wilcox attended physical therapy from February 23 to April 19, 2004. (*See* A.R. 251-59) As of April 19, 2004, she reported that she was "much better than . . . when [she] first started, but still having some intermittent [lower extremity] symptoms." (A.R. 251) She indicated her exercises were "really helping"; however, she had been unable to return to school for the current quarter "due to the pain when pulling [her] book bag (in a cart with wheels)." (*Id.*) The therapist noted Wilcox had been unable to start Phase 2 strengthening and stabilization exercises, although she had

improved. She was advised to "continue with the self treatment exercises, add lateral compartment tech[nique] as needed and increased daily walking as long as the [lower extremity] symptoms continue to reduce." (*Id.*) Overall, the therapist noted Wilcox was improving and responding to the current treatment plan. (*Id.*)

On April 26, 2004, Wilcox saw Richard Abraham, M.D. (filling in for Dr. Panum) for recheck of her back. She reported that her four physical therapy sessions had helped her back pain "immensely," and she had "returned to her baseline." (A.R. 352) The physical therapist had requested three more sessions, which were approved by the doctor. Wilcox was undergoing vocational rehabilitation for retraining in a different job, and she was given a release to return to work. (A.R. 352-53) She was advised to continue doing her home exercises. (A.R. 353) (This was her last visit to Dr. Panum's office. *See* A.R. 391)

On July 29, 2004, Mary Ann Westfall, M.D. reviewed the record and completed a Residual Physical Functional Capacity Assessment form. (A.R. 392-96) She opined Wilcox could lift up to twenty pounds occasionally and ten pounds frequently; sit, and stand or walk, for a total of six hours each in an eight-hour workday, with normal breaks; push/pull without limitation; occasionally climb ramps or stairs, stoop, kneel, crouch, and crawl, but never climb ladders, ropes or scaffolds; and balance frequently. She opined Wilcox would have no manipulative, visual, communicative, or environmental limitations. (*Id.*) On November 23, 2004, Martin Kehrli, M.D. reviewed the record and concurred in Dr. Westfall's conclusions. (A.R. 396)

Wilcox saw Dr. Purvis for followup on September 3, 2004. She was noted to be "stable and doing well." (A.R. 416) She called the doctor's office on September 10, 2004, stating she had been unable to take a deep breath since noon, and she felt "shaky." (*Id.*) She was advised to go to the E.R. "or urgent care." (*Id.*)

On December 3, 2004, Wilcox saw Dr. Purvis for followup. Notes indicate she had "eaten too much over Thanksgiving and gained several pounds back"; her weight was 256 pounds. (A.R. 416) They discussed getting her back into a diet and exercise program. (*Id.*) When she saw Dr. Purvis on March 4, 2005, notes indicate Wilcox had "arthritis in the left knee, which [had] been x-rayed in the past." (A.R. 415)

On April 5, 2005, Wilcox saw Dr. Purvis reporting a recent "flare-up of back pain and sciatica down the right leg similar to what was going on about a year ago." (A.R. 414) She was using a cane to walk, but seemed to have "adequate muscle function, both extension and flexion of the foot." (*Id.*) Dr. Purvis prescribed Darvocet N 100. (*Id.*)

Wilcox returned to the OM clinic on April 13, 2005, requesting physical therapy. According to Wilcox, she had been informed that neither Dr. Purvis nor Wilcox's former physical therapist was covered for further occupational therapy by her insurance, and she had been told to see a doctor at the OM clinic. Only a brief examination was done. Notes indicate Wilcox was "using a cane in her right hand," and she walked with a limp. (A.R. 562) She was diagnosed with chronic sciatica, and directed to follow up with her regular physician. (A.R. 562-63)

On May 5, 2005, Wilcox saw rehabilitation specialist K. Annette Weller, M.D., on referral from SAIF Corporation, for Dr. Weller to assume Wilcox's care as attending physician. (A.R. 433; *see* A.R. 433-37) Wilcox noted she was "two terms away from her associates degree," which she planned to finish "and then go on to get a teaching certificate at the University of Oregon." (A.R. 435) On examination, Wilcox was noted "to reduce weightbearing on the right leg," and her pain appeared to be "focused to the right sacroiliac region." (*Id.*) Dr. Weller noted Wilcox had "some persistent findings consistent with a right L5 radiculitis and some dysesthetic pain." (A.R. 437) She prescribed a course of physical therapy "focusing on developing a program of lumbosacral spinal stabilization and a trial of hydrotherapy." (*Id.; see* A.R. 559-61) She prescribed a trial of Neurontin for pain, and noted that if Wilcox was not significantly improved in six weeks, a further MRI study should be considered. (*Id.*)

On May 24, 2005, Wilcox was seen by physical therapist Karl Kolbeck for evaluation on referral from Dr. Weller. Wilcox reported that about two-and-a-half months earlier, she had spent a day or two "helping her husband in the garage holding some items up on the wall," and she awoke in the morning "with limited motion, function and increased pain." (A.R. 465) The pain was in the central and right lumbar area, and referred into her right leg in the back of the thigh and side of the leg. She reported that maintaining any position for more than thirty minutes aggravated her pain, as did bending and twisting. "Light dynamic activity and changes out of static postures [was] relieving." (*Id.*) She was scheduled for eight weeks of therapy per Dr. Weller's referral.

(A.R. 466) She had no new complaints at her session on May 26, 2005 (A.R. 464), and on June 1, 2005, she reported her low back was "feeling a lot better already by just using better body mechanics and posture." (A.R. 463)

Wilcox returned to see Dr. Purvis on June 3, 2005. She was continuing in physical therapy and doing water exercises, and noted she had "definitely improved." (*Id.*) Her medications were continued without change.

Wilcox saw Dr. Weller for followup on July 1, 2005. She reported that the physical therapy was proving very helpful, and she rated her pain "as zero." (A.R. 431) She stated that over the previous two weeks, she had experienced pain as high as 5/10 in her right leg, posterior calf and thigh, "usually in the evenings." (*Id.*) She was doing home exercises three times a week and pool exercises twice a week. She reportedly was sleeping fairly well at night. Dr. Weller prescribed additional physical therapy and home exercise program. (*Id.; see* A.R. 554-58)

Wilcox continued with her physical therapy sessions, receiving treatment on June 8, 10, 15, 17, 22, 24, and 29; July 1, 6, 8, 15, and 29; and August 3 and 10, 2005. (A.R. 447-61) She improved with treatment, noting on June 17, 2005, that "she was able to do some light work in garden with several hrs rototiller." (A.R. 458) She made steady progress, with "overall improvement of 85%" by August 3, 2005. (A.R. 448)

On August 11, 2005, Wilcox told Dr. Weller she was doing much better overall, "with no more radicular symptoms." (A.R. 480) She complained of some stiffness in her back in the morning that improved with movement. At the end of the day, her pain and

discomfort would increase again, focused primarily in her right low back just above the hip area. She was continuing with physical therapy once or twice a week, doing pool exercises two to three times a week, and exercising in the gym once or twice a week. She also continued with her home exercise program. On examination, her lumbar range of motion was good. She exhibited some tenderness in the right lower lumbosacral paraspinal region. The doctor prescribed continued physical therapy for four more weeks. (*Id.*; *see* A.R. 552-53)

Wilcox continued her physical therapy, with sessions on August 17 and 31, 2005. (A.R. 445-46) Although she still complained of "difficulty with maintaining sitting and standing positions for prolonged periods and extended walking" (A.R. 445), she noted she was seeing "improvement in activities that she normally would have difficulty with say a few months ago or even way back at initial injury time period." (A.R. 446)

On September 6, 2005, Wilcox saw Dr. Purvis and reported "feeling well with no complaints, tolerating her medications." (*Id.*) The doctor indicated Wilcox likely would need an increased dosage of blood pressure medication, which Wilcox was "very resistant to consider." (A.R. 413)

Wilcox saw Dr. Weller on September 27, 2005. She reported some increased pain the previous week "after walking and standing on concrete to do some canning activities in her home." (A.R. 429) The pain improved when she laid down. She was using Darvocet only rarely. She had taken some time off from school after her most recent injury, but planned to start classes again in the winter term. Dr. Weller noted Wilcox "continue[d] to have weak spinal

stabilizers," and indicated she would benefit from additional physical therapy focused on spinal stabilization, strengthening, and self-management. She prescribed treatment for another four to six weeks. (*Id.*)

Wilcox had physical therapy sessions on September 7, 14, 21, and 28; and October 7, 12, and 19, 2005. (A.R. 438-44) She reported some ongoing bowel and bladder problems that she stated had been present ever since her accident. Exercises improved her symptoms somewhat, but problems continued to persist at times. According to Wilcox, her physician knew about the problem and had told her "that's as good as she [would] get." (A.R. 443) On October 7, 2005, she reported walking at the mall with a friend when she felt her left knee "'jerk' and her back tweek." (A.R. 440) She complained of lower back pain and knee pain. The physical therapist, as well as the PT director, agreed that her knee problem "appear[ed] to be a lax [posterior cruciate ligament] PCL." (*Id.*) They directed Wilcox to contact her primary care physician "as she would benefit from a brace to prevent hyperextension." (*Id.*) On October 12, 2005, Wilcox was noted to be using a cane to walk because she stated her knee wanted to hyperextend. Her low back, however, was doing much better. Wilcox was unable to complete her exercise program at the session due to high blood pressure. (A.R. 439)

On October 19, 2005, Wilcox stated the physical therapy sessions and exercises had "definitely helped increase her strength and endurance." (A.R. 438) She stated her left knee would "fold[] on her som[e]times." (*Id.*) She related her current knee problem to her 2003 accident, opining that other health care providers had

overlooked it, "thinking it was related to her back." (*Id.*) Notes indicate Wilcox had improved range of motion of her lumbar spine, increased strength, and was doing well with her home exercise program. (*Id.*)

When Wilcox saw Dr. Weller on October 25, 2005, she complained of intermittent left knee pain, and occasional hyperextension of her knee that would cause increased low back pain and knee pain. The pain usually would improve after several days of rest. According to Wilcox, the physical therapist had some concern "about ligamentous laxity at the knee and . . . suggested use of a knee splint." (A.R. 427) Wilcox had no current knee or back pain, and she continued to do home exercises. Dr. Weller suggested Wilcox might benefit from a neoprene sleeve on her left knee, but she noted that because of Wilcox's "build she would need a custom fabricated neoprene sleeve in order for it to be effective and tolerable." (A.R. 428; *see* A.R. 532-33) She recommended Wilcox use the sleeve "especially during any walking activities to provide additional proprioceptive feedback and reduce further injury." (*Id.*)

Wilcox saw Dr. Weller on December 22, 2005, complaining of increased left knee pain. Wilcox stated this was "typical for her . . . in the winter months [when] her pain seems to be a lot worse." (A.R. 425) She stated her pain had increased with the onset of cold, rainy weather. She described pain "in right greater than left low back, where she [had] an aching burning discomfort," and "aching over the bilateral anterolateral thigh and numbness and tingling traveling into the anterolateral lower legs . . . [with] some intermittent tingling in the left third toe." (*Id.*) Wilcox

stated she would like to return to school to finish the two terms remaining for her associate's degree. She had stopped school "two years ago after a fall with the left leg giving out and aggravation of her injury." (*Id.*) She was taking Darvocet and Advil 400 mg as needed. She continued to do her home exercise program every day. She agreed to a trial of a Lidoderm patch to help with pain management. (*Id.*)

On January 9, 2006, Wilcox saw Leslie Mehlhaff, M.D. to establish a new primary care physician because Dr. Purvis was no longer approved by Wilcox's insurance company. Wilcox reported that her "main issue has been hypertension, but also a history of gout, seasonal allergies, migraines and anxiety." (A.R. 472) A regimen was established to monitor her blood pressure. She returned on February 1, 2006, for followup. Notes indicate Wilcox was "suffering with a lot more back pain now than previously," and she was under Dr. Weller's care for her back pain. (A.R. 471)

Wilcox also saw Dr. Weller on February 1, 2006, reporting increasing back pain. She indicated she was "having difficulty even just standing and bearing weight very well through her right leg." (A.R. 423) Her pain was "focused in the right low back and buttock, with quite a bit of frequent muscle spasms and palpable knots in the right buttock region, posterior thigh, and just past the knee into the anterolateral lower leg." (*Id.*) She also had numbness and tingling over the right lateral leg if she sat for more than ten or fifteen minutes at a time. Lidoderm patches had been helping her sleep. On examination, the doctor noted reduced muscle strength in Wilcox's ankles, and diminished muscle stretch reflexes in the bilateral lower extremities. She also exhibited

diminished sensation to pinprick along the right anterior, medial, and lateral thigh and the anterior and lateral lower leg. (*Id.*) Dr. Weller continued the Lidoderm patch, prescribed Flexeril, and prescribed physical therapy for six weeks. (*Id.*)

On February 6, 2006, Wilcox saw a physical therapist for a flare-up of significant pain in her back with right lower extremity symptoms "including pain, ache and some parasthesias." (A.R. 410) The therapist noted Wilcox was "currently disabled." (*Id.*) Wilcox stated her current symptoms were causing her difficulty with "walking, work, personal cares, sleeping, dressing and sitting." (*Id.*) She was scheduled for a course of treatment over the next six weeks including:

> soft tissue mobilization, joint mobilization and muscle energy techniques, Therapeutic exercise including - stabilization exercises, exercise to strengthen postural musculature, exercise to accelerate healing process and aquatic exercises, Home Exercise Program (HEP) consisting of strengthening/stabilization exercises, pool therapy and Modalities including - ultrasound to and interferential to decrease inflammation and decrease pain.

(A.R. 411) Wilcox responded well, although slowly, to the pool therapy. (A.R. 406-09) By February 27, 2006, she reportedly was "about 50-60% back to previous level." (A.R. 405)

On March 14, 2006, Wilcox saw Dr. Weller for followup. She stated physical therapy had been very helpful in reducing her pain. She indicated she would have frequent, intermittent pain during the day if she did any type of standing activities, such as doing dishes or cooking. The pain often was relieved if she could lie down and rest fairly soon after onset of the pain, but if she continued activity once the pain had started, she would have a more

significant flare-up of symptoms. Her medications were continued without change, and she was directed to continue with physical therapy for six more weeks. (A.R. 421)

When Wilcox's course of physical therapy ended on April 17, 2006 (*see* A.R. 534-50), Wilcox rated her overall improvement at 8/10. She still had some pain, but was comfortable continuing with her home exercises. She was able to sit for one to two hours at a time in an "appropriate chair," and she could "perform all housework if paced." (A.R. 399)

Wilcox saw Dr. Mehlhaff on May 12, 2006, for biopsy of a lesion on her left upper posterior arm. She had been unable to tolerate Lipitor "due to severe muscle achiness," and she stated that although she was going to the gym twice a day, exercising made her feel tired. (A.R. 470) She had "decreased the amount of walking she [was] doing due to her sense of instability." (*Id.*) She expressed a desire to see a counselor, noting she felt "depressed about her health issues and lack of ability to do the things that she want[ed] to do." (*Id.*) She was referred to a counselor. (A.R. 469)

On August 7, 2006, Dr. Weller wrote an opinion letter to Wilcox's attorney regarding her care of Wilcox. Dr. Weller stated that due to Wilcox's "lumbar disc condition, she has limited ability to tolerate sitting . . . [and] also limited tolerance for standing activities." (A.R. 477) The doctor offered the following opinion of Wilcox's work-related abilities and impairments:

> It is my opinion that [Wilcox] is not able to perform any sustainable work activity, even light activity. My understanding is that light work can require a good deal of walking or standing activity, which would lead to

> flareups of the patient's low back and right leg pain, such that she would not be able to perform this work on a sustainable basis. In addition, because of her disc condition, she would not be able to tolerate sustained periods of sitting required for a sedentary job. With her back condition, she requires frequent changes in position, alternating between sitting and standing and occasionally lying supine.
>
> During the course of the past year and a half that I have been providing treatment to [Wilcox], she has been experiencing flareups of her pain primarily in the winter months. She was attending classes at LCC but was limited in this by her limited sitting tolerance and walking ability. She has had significant flareups of radiculopathy with associated right leg weakness but more typically demonstrates good strength in both legs, primarily sensory radicular complaints.
>
> It is my opinion that [Wilcox's] medically determinable impairments are due to her low back condition with the L4-5 disc herniation and disc degeneration is sufficiently severe that she would be unable to maintain a regular work schedule and would miss more than two days a month due to flareups of pain.
>
> In addition to the lumbar disc condition, [Wilcox's] other medical conditions, including poorly controlled hypertension, also contribute to her disability.

(A.R. 477-78)

Wilcox saw Dr. Mehlhaff on August 17, 2006, for followup of her hypertension. She noted that she was unable to walk on some days due to her back pain. The doctor "gave her a back book today and encouraged her to concentrate on the right ways and wrong ways to do the exercises, etc." (A.R. 667)

On October 4, 2006, Wilcox underwent a psychodiagnostic examination by Pamela Joffe, Ph.D. at the request of the Oregon Department of Human Services. Dr. Joffe administered several diagnostic tests and conducted a thorough interview. Wilcox

provided the following description of her activities of daily living:

> [Wilcox] gets up at varying times. If she can be asleep by 11:00 p.m., she gets up at 7:30 a.m. If she can't fall asleep until 3:00 or 4:00 a.m., she might sleep in until 9:30 a.m. In the mornings, she cleans her house. During the day, she tries to walk one mile and also reads or does laundry. In the evenings, she and her husband have dinner together and watch T.V. She goes to bed anywhere between 11:00 p.m. and 3:00 or 4:00 am. She lies down for a period of time but then has to get up and walk to relieve her pain. She has been putting on a pain patch . . . at 10:00 p.m. and taking it off at 10:00 a.m., which reduces her level of pain and allows her to sleep. The Flexeril also helps decrease her muscle spasms, so she can sometimes sleep up to four hours in a row. Her doctor wants her to lie down for at least eight hours each night.
>
> She and her husband prepare meals. She only bakes things now so that she doesn't have to stand as long in the kitchen. She showers every other day.
>
> Her hobbies include reading, walking and bird watching. On good days, she can walk a mile loop around her house. The other days, she walks to the end of the block and back. She has friends on whom she can count.
>
> Most days, she is able to drive, and she does have a valid driver's license. She drove to today's appointment. She uses the bus occasionally, as well.
>
> She is also [able] to shop on her own only occasionally because she is in more pain when she walks on concrete floors. She does two loads of laundry every other day.
>
> She had been attending Northwest Faith Center but has difficulty sitting for long, and after a remodel at the church, there is no place for her to stand during services. She last attended there six months ago.
>
> She uses a computer at home for about 15 minutes per day and is independent in her use

> of the phone. She and her husband manage their own money and are not in debt.

(A.R. 482-83)

For her present complaints, Wilcox stated she

> has to lie down to rest her back frequently. She can sit for only 30-45 minutes at a time and can stand for only 30-45 minutes at a time, and then she must either lie down or walk to relieve the pain in her back and legs. This has been a problem since the year 2000, when she was hurt in a bus accident. When asked to rate her pain on a scale of 1-10, with 10 being the most severe, [she] said she would be at a level 8 during the assessment, as she had to walk up the stairs to get to the appointment. Lying down to relax her back and legs reduces her pain and [there] are periods of time early in the day when she can be briefly pain-free. During the day, however, her pain builds up again. She said she can no longer push herself, and this is difficult because she has always been the kind of person who has pushed herself.

(A.R. 483) Dr. Joffe observed that Wilcox demonstrated "[q]uite a bit of pain behavior" during the interview, moving around on the couch, and moving pillows during the interview to relieve her pain. (*Id.*)

Wilcox stated that since her accident, she had become more depressed and hopeless. She had planned to continue driving a bus until retirement, and then to retire and travel with her husband. (*Id.*) She feels sad much of the time, has difficulty making decisions and concentrating, and is more irritable and more easily fatigued than she used to be. Her score on the Beck Depression Inventory indicated mild depression. (A.R. 484) Dr. Joffe's diagnostic impressions included, for Axis I, "Mood Disorder (Depression) Due to General Medical Condition (Back and Leg Pain)," and for Axis IV, Psychosocial Stressors, "Debilitating physical

symptoms, unemployed, financial stresses at home, decrease in ability to walk and sit." (A.R. 484-85) She estimated Wilcox's Global Assessment of Function (GAF) at 50, indicating "[s]erious impairment in physical and occupational functioning." (A.R. 485)

Dr. Joffe reached the following conclusions regarding Wilcox's psychosocial abilities:

> [Wilcox] was able to understand and remember instructions during the interview. She appears to be a bright person who has had a good work history in the past. She also appears to be able to understand and remember more complicated instructions.
>
> In terms of her ability to maintain concentration and attention, [she] scored in the low average range on the digit Span subtest. She had no difficulty adding 3 to numbers and could recall two out of three unrelated items after three minutes. She could spell the word "world" correctly forwards and backwards.
>
> It is likely that her physical symptoms interfere with her ability to maintain attention and concentration for extended periods of time. She said she must wait everyday to see how her back feels and how she walks in order to make plans for that day. She fears not having control of her body, feels "down" and has difficulty maintaining a positive attitude. There are some days she feels confused, especially when taking pain medications several days in a row. If she overextends herself, she must wait several days before she can "get my back and legs settled down again." She could not be expected to maintain a regular schedule, given her physical condition.
>
> Interpersonally, [she] describes no difficulty, and she has contact with her family and friends. She describes no history of problems interacting appropriately in the work setting or with accepting instructions or criticisms from supervisors. Her behavior appears to be socially acceptable and she was neat and clean.
>
> In terms of adaptive skills, she has good communication skills. Her self-care and home-

> living skills are diminished somewhat by her physical complaints. For example, on days when she has more pain, she is less able to care for herself and her home. She showers every other day, is able to do some housecleaning and does laundry as needed. Her son has moved in with her to provide assistance. She is using community resources in the form of her physician at this time. She has been unable to attend church for the past six months, as she can't stand during services. Her leisure activities include some embroidery, making Barbie clothes for her grandchildren, reading and spending time with friends. She does not appear to be a danger to her own health or safety at this time.

(A.R. 485-86)

On October 16, 2006, Wilcox saw Kurt Brewster, M.D. for a consultative orthopedic examination at the request of the state agency. (A.R. 491-506) Wilcox was noted to be cooperative and to give a satisfactory effort during the examination process, although her responses were noted to be "sometimes vague regarding some symptoms including description of radiculopathy."[4] (A.R. 491)

Regarding her activities of daily living, Wilcox stated her son and brother had to help her dress most of the time. She estimated she could reach above her head 75% of the time, and could pick up something she had dropped 25% of the time. She could pick up a can of soup, telephone book, and gallon of milk, but could not pick up a one-year-old "(avg. 22 pounds)." (A.R. 500)

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[4]At Wilcox's third hearing, the ALJ stated, "[T]he report of Dr. Brewster can be certainly read in a way that says this lady is either exaggerating or she's not as bad as she says she is[.]" (A.R. 743) Other than Dr. Brewster's notation that Wilcox was "sometimes vague regarding some symptoms including description of radiculopathy" (A.R. 491), the court has located nothing in Dr. Brewster's report that suggests Wilcox was either "exaggerating or . . . not as bad as she says she is."

She estimated she usually stood for three total hours in a day, walked for two hours a day, and spent two hours watching television, and one hour reading each day. She exercised three times a week with "30 minutes of stretching [and] swimming." (*Id.*) She estimated she spent two hours a day doing housework, but she could not do any sweeping or vacuuming. (*Id.*)

The doctor observed that Wilcox walked "with a slight limp on the right." (A.R. 501) He observed no obvious muscle spasms in her back, and she was able to sit on the table without changing position for ten minutes. She got onto and off of the table without difficulty. Wilcox's physical symptoms were noted to be "variable throughout this and prior exams," with pain radiating first to one leg, then the other, and then to both legs (which the doctor described as "migratory left and right symptoms"). (A.R. 504) His overall findings indicated Wilcox had "mild restrictions walking, standing, as well as frequent restrictions on stooping, given history of previous surgery without success." (*Id.*)

He obtained x-rays of Wilcox's lumbar spine that showed "Moderately severe degenerative disc disease" at L4-5, and "Moderate osteoarthritis particularly involving the facets from L4 caudally." (A.R. 505)

Following his examination of Wilcox, Dr. Brewster completed a Medical Source Statement of Ability to do Work-Related Activities (Physical). He opined Wilcox would be able to lift/carry twenty pounds occasionally and ten pounds frequently; stand and/or walk for about six hours in an eight-hour workday; sit without limitation; push/pull occasionally; and perform all postural activities frequently. He also opined she would be able to reach

frequently, and perform handling, fingering, and feeling activities without limitation. He found her to have no visual/communicative or environmental limitations. (A.R. 487-90)[5]

On November 30, 2006, Dorothy Anderson, Ph.D. reviewed the record and completed a Mental Residual Functional Capacity Assessment form (A.R. 507-09), and a Psychiatric Review Technique form (A.R. 511-24). She opined Wilcox would be moderately limited in her ability to carry out detail instructions, and maintain attention and concentration for extended periods, but she would have no other limitations in her work-related mental abilities. (A.R. 507-09; *see* A.R. 524) Her limitations would result from her "focus on her physical problems, concerns and pain," which Dr. Anderson opined would limit Wilcox's "ability to attend and concentrate on more complex and detailed tasks," but would not disrupt her from simpler tasks. (A.R. 509) She indicated Wilcox's pace and schedule would not be impacted by her mild psychiatric factors or depression. (*Id.*)

Wilcox saw Martin L. Jones, M.D. on January 31, 2007, for followup of her hypertension and hyperlipidemia. Regarding her activity level, she noted she generally would get up and walk

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[5]The court notes that Wilcox has expressed concerns about Dr. Brewster's "manner" and "behaviors [that] were unprofessional." (A.R. 755; *see* A.R. 726-28) At the ALJ hearing, her attorney implied that the ALJ should take Wilcox's concerns into account in his consideration of the report. (*Id.*)

Counsel also expressed some concern that Dr. Brewster had seen Wilcox immediately after her accident in May 2000, and implied that the doctor therefore was an inappropriate choice for this consultative examination. (A.R. 753-55) The court finds no indication in the doctor's report that he remembered Wilcox from seeing her six years previously, and his findings were unaffected by that fact.

around for about thirty minutes, and then have to go back and rest for about thirty minutes. (A.R. 664)

Wilcox saw Dr. Weller on February 6, 2007, reporting "recent flareup of pain that [was] worse than she [had] had all year." (A.R. 621; *see* A.R. 731-32, where Wilcox testified about the flareup of muscle pain) Notes indicate Dr. Weller had last seen Wilcox on March 14, 2006. Wilcox reported frequent flareups of significant pain over the previous year, typically lasting three to four days. She was still exercising at home every day, except when her pain was more severe, and she also tried to walk a mile a day whenever she was able. She continued to use Flexeril and Lidocaine patches, both of which were helpful. (*Id.*) Dr. Weller prescribed a course of six sessions of physical therapy "to include some joint mobilization and soft tissue mobilization, as well as reviewing and updating a home exercise program." (A.R. 622)

Wilcox attended physical therapy sessions on February 14, 21, 23 and 27, and March 1, 5, and 7, 2007. (A.R. 613-20) She improved rapidly, except for one incident when she got chilled and her back tightened up, and by the last session, she had returned to her baseline level. (*Id.*)

B. Summary of Vocational Evidence

All of Wilcox's past relevant work was driving a bus, including driving for a charter company, a school bus, and a city bus. (*See* A.R. 14350) Based on Wilcox's Disability Report-Adult, completed at the time she applied for DI benefits (A.R. 122-29), and a telephone interview with Wilcox's last employer (A.R. 112-13), the Social Security office recommended an onset date of

February 9, 2002, rather than Wilcox's alleged onset date of May 3, 2000. As explanation for the recommendation, the Field Office noted the following:

> Claimant returned to work at the [substantial gainful activity] level after her injury from 10/2000 - 03/2001. She was earning $16.05/hr, working 5 days/wk. She was off work again, then returned in 6/2001 - 9/2001 working ap[p]roximately 4-6 hrs/day at the same rate of pay. She increased her working hours from 11/2001 through 2/8/2002 to 4-8 hrs/day at the same rate of pay. The claimant did indicate that special work conditions existed in her workplace so that she could continue working. Her employer agreed on the work activity questionnaire indicating that a 60% subsidy was provided to the claimant which began on her injury date and continued until her employment ended on 2/8/2002. The claimant indicated . . . that her work ended due to her disability. It appears that the claimant was working at the SGA level through 2/8/2002 even after considering the 60% subsidy provided by the employer.

(A.R. 130-31; *see* A.R. 112-13)

In late February 2007, Wilcox sought retraining assistance from Vocational Rehabilitation Services (Voc Rehab). She completed a Personal Information Form listing the following employment history:

- 1988-1990 - bus driver for Pacific Rim Coaches. She left because with children at home, she wanted some consistency to her schedule.
- 09/89 to 06/90 - substitute School Bus Driver for Creswell School District. She left when she got a full-time position at Mayflower in Eugene, Oregon.
- 08/90 to 06/95 - School Bus Driver at Mayflower/Laidlaw. She left when she got a better job.
- 06/95 to 02/02 - Bus Driver for Lane Transit District.

(A.R. 654-55) Wilcox asked Voc Rehab to help her get another job by providing her with training, equipment, and "knowledge of what's available." (A.R. 651) She was noted to have high confidence in her abilities, but not to feel independence. She was receiving physical therapy to build her physical tolerances. (*Id.*)

In her Functional Capacity Self-Assessment, Wilcox stated she could never bend, squat, crawl, climb, or lift/carry over 20 pounds. She indicated she could reach above shoulder level occasionally, and lift/carry up to ten pounds frequently and twenty pounds occasionally. She could use her hands for all types of repetitive movements, but could not use her feet for repetitive movements such as operating foot controls. She stated she was restricted in connection with all environmental hazards (changes in temperature and humidity; exposure to dust, fumes, and gases. (A.R. 650) She commented that she is unable to climb ladders or steps; she moves slowly; cold makes her back hurt; she has chronic bronchitis/asthma; and per SAIF instructions, she could not do driving or deliveries. (*Id.*)

The Voc Rehab interviewer noted the following about what Wilcox wanted to gain from Voc Rehab services:

> This pleasant 51 year old woman seeks VR assistance to determine what she can do to work within limitations. She is 2 terms short of an AA degree in Early Childhood Education. She wants to continue to work in public service, as she did when a driver. She enjoys helping people, 'I felt good helping people travel on the bus.' Children are drawn to her. She enjoys working on a computer and took several LCC classes; CS 120 and Intro to Computers. She drives a car [for] transportation.

(A.R. 647) The evaluator noted Wilcox might "benefit from LILA Disability Management Workshop," and she likely would "need [an] ergonomic workstation." (*Id.*)

Wilcox participated in several workshops at Voc Rehab. (A.R. 639, 641-42) On May 7, 2007, a Voc Rehab counselor wrote Wilcox a letter stating they had been unable to determine her eligibility for services because they lacked medical records regarding her disability. (A.R. 637) Wilcox participated in a couple more workshops. (A.R. 634-35) On June 5, 2007, Voc Rehab "determined that this individual require[d] and [could] benefit from VR services to prepare for, enter into, engage in, or retain gainful employment." (A.R. 631-32) Notes indicate Wilcox would require flexible hours and an ergonomic workstation. (*Id.*) Wilcox participated in Voc Rehab training and workshops on May 9 and 30, and June 6 and 13, 2007. (A.R. 627-28) She became "interested in a work evaluation at LILA [which would] give her information about physical capacities to perform clerical work." (A.R. 627) A couple of possible jobs were discussed, but Wilcox's limitations prevented her from working in either of them. (A.R. 623-24, 627) Wilcox expressed interest in completing her "AA in teaching at LCC and to get a teacher aide or substitute job." (A.R. 623)

At Wilcox's ALJ hearing on March 13, 2007, Vocational Expert ("VE") Lynn Jones testified that Wilcox's past relevant work as a bus driver was at the medium exertion level, and was semi-skilled. (A.R. 746) The ALJ asked the VE the following hypothetical question:

> Okay I've already made a reference to this. There are some opinions on limited range of light work and then there's another

> opinion of no work so let me just give you the one that's, opines that work can be performed. Currently we're dealing with an individual who's 51 years of age, a high school graduate with this past job. Now everybody indicates that job can't be performed so that's the end of, there's no question with that. From an exertional standpoint I want you to assume that we're dealing with an individual who has, is limited to light work in regarding carrying and lifting 20 pounds maximum, ten pounds frequently, pushing and pulling, again limited by those weights. Standing and walking, they indicated that standing and walking would be about six hours in an eight-hour workday. Sitting would be about the same. Some opinion here indicates there's no limitation on sitting but I'm going to limit it to about six hours in an eight-hour workday. There's limited to only occasional reaching overhead. With this type of, the type of orthopedic question involved I want you to look at occupations that don't involve repetitious bending and lifting from waist to floor level and earlier I made reference to some change of position, what we refer to is the sit/stand option in occupations. So within the maximums I've given you the individuals should have an ability to change position throughout the workday from sitting, from sitting to standing and walking and from standing and walking to sitting. In a non-exertional standpoint the only, there is some difficulty in attending and concentrating on complex and detailed tasks but simple, more simple repetitive tasks should be capable of being performed according to the non-exertional limitation assessment here. All right and again one of the key question[s] of course is going to be sustainability so first off I want you to assume that we're talking about an individual who could perform these limitations on a sustained basis in a normal competitive work setting with the normal expectations of time, attendance, break schedules, etcetera. All right so past work obviously is out. What about other occupations that you might consider feasible?

(A.R. 746-48)

The VE gave examples including small product assembly, parking lot cashier, and table worker, all of which are unskilled jobs at the light exertional level. (A.R. 748, 750) The VE stated all of

these jobs include a sit/stand option, possibly with some walking but "not a main issue." (A.R. 749) The jobs also would involve a maximum of twenty pounds of lifting. (*Id.; see* A.R. 750)

In response to questions from Wilcox's attorney, the VE indicated that if the individual were required to lie down for a total of about three hours in an eight-hour workday, the individual would be unemployable. (A.R. 748-49) Similarly, if the individually periodically needed to take a hot bath for thirty minutes at unpredictable intervals, she would be unable to work. (A.R. 751-52) None of the listed jobs would allow unscheduled breaks of thirty minutes at a time for exercise, nor would they allow 75-minute breaks for aquatic therapy. (A.R. 752) The VE indicated that if someone were absent chronically for two or more days per month, the individual would not be employable competitively. (*Id.*)

C. Wilcox's testimony

1. Pain Questionnaire

On June 20, 2004, Wilcox completed a pain questionnaire. She indicated her pain is "burning, aching, not stinging," and it is located in her "lower back, both sides of L4-5 . . . left leg, knee." (A.R. 151) The pain lasts from ten minutes to hours at a time, and she has pain daily. Sitting, standing, and walking for more than 30 minutes causes her pain, and the pain will worsen if she stays in a static position. Changing position, hot/cold packs, mild exercise, and the "passage of time" make the pain better. (*Id.*) She takes Naprosyn, Ibuprofen, Aspirin, and Doxepin for her pain, and Flexeril for muscle spasms. (A.R. 151-52) The medica-

tions cause her to be lethargic and "drugged feeling," and she thinks they cause her to have an "abnormal sleep pattern." (A.R. 152)

At the time she completed the questionnaire, Wilcox was able to be up and active for one-half hour before needing to rest. She was unable to complete tasks such as washing dishes, folding clothes, and doing laundry, all at once if the tasks took longer than one-half hour. She stated she used to enjoy hiking, shopping with friends, gardening, and playing with her grandchildren, but she could not do these things any longer. (*Id.*)

Wilcox indicated she needed assistance with her personal grooming, including clipping her toenails and "rubbing dry skin on feet." (A.R. 153) She needed help with all household chores "below waist level, sweeping, . . . [a]nd vacuuming." (*Id.*) She could prepare her own meals, but friends also cooked for her. She visited friends occasionally, but could only engage in hobbies or pastimes for one-half hour before resting. (*Id.*)

2. Activities of Daily Living and Socialization

Wilcox also completed an Activities of Daily Living and Socialization form on June 20, 2004. (A.R. 154-60) She stated that several days a week, she needed help putting on her shoes and pants because she could not bend over. (A.R. 154) She prepared her own meals about three days per week, with less than one-half hour preparation time. Her eating habits had changed since her injury because she was on a "restricted diet due to decreased exercise. Hypertension was previously controlled with exercise." (A.R. 155) She also had "fewer large family dinners." (*Id.*)

She stated she could do "limited laundry and kitchen cleaning, no bending and less than 1/2 hour standing." She hired someone to clean the floors and bathrooms each week, and her husband did the rest of the housework. (*Id.*) Before her accident, she was "a very energetic cleaner." She stated her husband used to call her the "White Tornado." (A.R. 156)

Wilcox indicated she handled the household finances and paid the bills. She planned and did most of the grocery shopping, but she had to know what she wanted, "go get it, pay for items and leave." (*Id.*) She stated, "Browsing is out of the question. Standing on cement floors kills me." (*Id.*) As a result, she no longer could do "comparison shopping and bargain chasing. [She] used to enjoy shopping with friends but [she] no longer can handle lengthy outings." (*Id.*)

Wilcox stated she had lost some of her ability to concentrate and to retain what she reads. She watched four to five hours of television per day. Before her injury, she only watched a maximum of two hours per day because she "was busy all the time" and "didn't have time to waste on T.V. then." (A.R. 157) She usually read about four hours per week, and worked on genealogy about an hour per week. She could only shop for up to thirty minutes at a time. She "used to sew but [was] unable to sit bent over the machine now." (*Id.*) She also used to enjoy flower gardening, but she could no longer "bend over now or step on [a] shovel" without pain. (*Id.*) She used to ride a bicycle in nice weather, but now was unable to do so because of spasms in her legs and back. (A.R. 158) She was unable to sit, stand, or walk for long periods of time, and she could not bend forward. (*Id.*)

Wilcox remained active in the Grange and her church to the extent possible, but she could not sit long enough for meetings. She enjoyed playing board games and cards, but she was unable to sit long enough to play games. (*Id.*)

In the "Remarks" section of the form, Wilcox stated:

> I was active in my church. I volunteered to assist the handicap[ped] and elderly with transportation to their doctor appointments and helped them do their shopping for clothes and food. I also helped do their yard work if needed.
>
> Now I am the one who needs this help sometimes It feels awkward to be on this end of things.

(A.R. 160)

3. August 29, 2006, Hearing

Wilcox is a high school graduate and has at least one year of college.[6] Although her doctors released her to return to school at one point, Wilcox still had trouble walking and never felt she could return to classes. (A.R. 695) Prior to her fall in January 2004 (*see* A.R. 355), she had been a full-time student since the summer term of 2003. After her fall, she dropped out of classes that semester, and she has never returned to school. (A.R. 695, 697)

Wilcox's brother, who "has schizophrenia," lives with Wilcox and her family, and Wilcox checks his medications every night to ensure he has taken his pills. (A.R. 708) Wilcox described her daily routine as follows:

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[6]It appears Wilcox may have had one year of college, and then several years later went back to school to become a teacher. (*See* A.R. 695)

> Well I get up about 8:00 and my brother goes out and he brings the newspaper in and I go out and walk around in the yard and sometimes I can't walk on the dirt surface, I have to walk on the pavement because it has to be totally flat for me. Some days I can walk in the yard. I do that for about half an hour and then I come back in and I'll sit down and read the newspaper and then after the newspaper I get up and I make our breakfast and I say our breakfast, I do my cereal and Tony [her brother] eats whatever he wants to eat and he actually does his own, too.

(A.R. 709) Wilcox tries to walk a mile every day, but many times she is not able to walk even past the end of her driveway due to back pain. (A.R. 710, 713) She ordinarily drives ten miles to the gym and works out three times a week, but at times, the ten-mile drive is difficult due to pain in her back and legs. (A.R. 710) Wilcox and her brother do the grocery shopping together. Wilcox cooks supper when she feels able, and when she is "having a bad time," her husband does the cooking. (A.R. 709) Her depression is worse on days when she is unable to do what she sets out to do. (A.R. 713) She often begins a task and then has to stop and sit or lie down due to pain. Her pain sometimes is accompanied by crying "[w]hen it gets overwhelming." (*Id.*) She stated that over the previous five or six years, it appeared she had "lost a little ground" each winter, with her condition worsening slightly each year. (A.R. 714)

Wilcox sometimes has difficulty "making a plan and staying on target of things," and she "tend[s] to get distracted." (A.R. 707) She sometimes has trouble remembering what she reads enough to follow a story, so she will make notes on index cards to help her remember "the basic characters." (A.R. 712) She has had some

problems finding her way to unfamiliar places. She stated she never had these types of problems before the bus accident. (*Id.*)

When Wilcox was in school, she used a tape recorder to record the teachers' lectures because she often would have to stand up, walk in the hallway for a few minutes, or lean against the wall in the classroom. In addition, she sometimes had trouble focusing on written materials, and she would "have problems remembering what [she was] reading and have to go over things many times." (A.R. 711) With the taped lecture, she was assured of not missing portions of the lesson. (*Id.*)

The ALJ questioned Wilcox about two distinct time periods reflected in Wilcox's treatment notes. The first was the period after the bus accident, when she initially injured her back. It appears from the record that she got treatment, recovered nicely, moved to the country and began raising some chickens, and went back to school to become a teacher. Then the fall occurred at school, and she never returned to school. The ALJ could find no evidence in the record to indicate Wilcox's physical condition deteriorated enough from the fall to warrant her quitting school and not being able to retrain and go back to work. (*See* A.R. 698-706) He noted that Dr. Weller had not addressed any change in Wilcox's condition, yet Dr. Weller indicated Wilcox cannot work despite the surgeon saying she can work. As a result, the ALJ decided to order a consultative examination by either an orthopedist or a neurologist. (A.R. 706) He wanted an objective evaluation by someone who could look at the entire record and determine what new or current findings would prevent Wilcox from all work when Drs. Gallo, Purvis, Panum, and "everybody is saying she can work at a certain

level. There's a physical capacity evaluation everybody endorsed that says light work and then things changed and yet no one has pursued to figure out what, if anything, really happened to cause that." (A.R. 715; *see* A.R. 715-17)

The ALJ also had some concern about several references by Wilcox's treating sources indicating Wilcox could benefit from some mental health counseling, yet Wilcox had never seen a counselor. Wilcox testified that she suffers from some depression when she is unable to get around very well, but the depression is absent when she is able to move better. (A.R. 706-07) The antidepressant medications she has taken have been prescribed by her family doctor, Dr. Purvis. (*See* A.R. 701-02)

4. March 13, 2007, Hearing

At the reconvened hearing, Wilcox amended her alleged disability onset date to October 1, 2005. (A.R. 722-23) She clarified that when she told Dr. Brewster, in October 2006, that she generally stood for three hours a day, that was a total, not three continuous hours. She stated she would be on her feet for awhile, then sit or lie down for 20 to 30 minutes, then get up and walk around again. (A.R. 729-30)

The ALJ again noted that of all Wilcox's treating sources, Dr. Weller is the only one who has indicated Wilcox is completely unable to work. Her other treating sources "have all said [she] could return to work in a limited category[.]" (A.R. 732) Wilcox stated Dr. Panum encouraged her to return to school, but after her fall, she was unable to return. She testified she has not returned to her condition prior to the fall. (A.R. 733)

Wilcox testified that Dr. Weller recommended vocational rehabilitation, and Wilcox was working with Voc Rehab to determine her capabilities and needs, and to help her identify jobs she might be able to perform. She was scheduled to begin some three-hour sessions through Voc Rehab for various types of training, and Voc Rehab personnel were aware that Wilcox would have to get up and move around during the three-hour training sessions. (A.R. 735-36)

Wilcox agreed that "on a good day," she is able to walk half a mile with no symptoms. (A.R. 736-37) She stated her "good days" occur once or twice a week. After she walks half a mile, she has to sit or lie down. She comes back from her walk and sits down, and if her symptoms are not relieved, then she will lie down, "get up and do some floor exercises and just keep doing things until [she] can get some relief." (A.R. 737) She also frequently takes a hot bath after her walk. (A.R. 738) She tries to walk five times a week, but there are days she is unable to walk half a mile and at other times she is unable to take a walk at all. (*Id.*)

Wilcox described problems sleeping due to back pain. When she has been in one position too long, she awakens and then is unable to get back to sleep. She sometimes gets up and watches television or walks around the house, and at times it takes a couple of hours before she again is able to lie down and return to sleep. (A.R. 739-40)

Wilcox does home exercises for about half an hour each evening, while she watches television. She does pool exercises that she learned from the physical therapist each morning. Her husband drives her to the pool, which takes about 20 minutes; she is in the pool exercising for about 20 minutes; it takes her 15

minutes to get dried off and dressed; and then it takes about 20 minutes for them to return home. She usually lies down for about 20 minutes when she gets home from the pool. (A.R. 741-42)

Wilcox stated she would not "be a very nice worker" if she had to be on her feet for any length of time at a full-time job. She stated if she stands for too long, her legs "go into spasms" and she gets "horrible spasms in [her] back as time progresses." (A.R. 742) If she had a sit/stand option and could take breaks during which she could lay down in her car, then she might be able to work. She stated that when she was in school, she would go to her car between classes, recline the seat and lie down for a few minutes, and that might work with an employer. However, she would need to be able to take breaks as needed, rather than on a set schedule. (A.R. 743) Over the long term, Wilcox does not believe she could sustain full-time work due to her pain. (A.R. 744)

D. Third-Party Testimony

Wilcox's husband, Steven E. Wilcox, completed a Function Report Adult - Third Party on March 20, 2004. (A.R. 134-42) He stated he and Wilcox "live together, talk, watch TV, read, [and] garden." (A.R. 134) Describing Wilcox's daily activities, he stated that on some days, she is able to do "limited housework, shopping, visiting, [but] other days she can only lay on [the] couch and read or watch TV." (*Id.*) On Wilcox's good days, she feeds the chickens and dogs, but "on other days she is in too much pain," and her husband does these tasks. (A.R. 135)

Steven stated that before Wilcox's accident, she could do a number of things she no longer can do, including driving a bus,

doing heavy housework, gardening, hiking, camping, earning income, and playing with her grandchildren. (*Id.*) He indicated pain interrupts Wilcox's sleep. (*Id.*)

Regarding Wilcox's ability to handle her personal care needs, Steven stated that on some days, Wilcox is unable to tie her shoes. At the time he completed the questionnaire, Wilcox could not sit in a bathtub; she could only take showers. She cannot bend forward for long enough to shave her legs. She requires a special toilet seat. And she has bowel and bladder accidents due to loss of sensation. (*Id.*) She has to use a medication journal to remember to take her medications. (A.R. 136)

According to her husband, Wilcox is able to fix "simple meals that require little standing" because she "cannot stand longer than 1/2 hour." (*Id.*) She prepares food for meals about three days per week, and he cooks on the other days. Before her injury, Wilcox used to prepare large family dinners. (*Id.*) She is able to do "limited laundry and cleaning that does not require bending," and she does these tasks for "less than 1/2 hour several times weekly." (*Id.*) Her husband helps with the indoor chores and does all of the outdoor chores. They hire someone to clean the floors and bathrooms. (*Id.*)

Steven stated Wilcox goes outside "almost daily," but she "cannot tolerate cold weather," and she uses a cane to walk outside. (A.R. 137, 140) She can drive and ride in a car, and she can go out alone. She shops for groceries and clothing, but her shopping only takes her about 1/2 hour per week. She is able to pay bills, count change, use a checkbook, and handle a savings account.

(*Id.*) Her condition has not affected her ability to handle money. (A.R. 138)

Before her injury, Wilcox used to attend church regularly, and visit family members who live out of town. She enjoys talking with family and friends on the phone and during personal visits. Since her injury, she can only attend church occasionally. Steven stated Wilcox "has good mental participation, not physical." (A.R. 138)

According to Steven, Wilcox can pay attention for "hours" at a time. She follows written and spoken instructions "very well," and she gets along very well with others. She handles stress and changes in routine very well. (A.R. 139-40)

In the "Remarks" section of the form, Steven stated Wilcox "cannot lift grandchildren. She was terminated from a job that she loved (bus driver) and has trouble accepting that she was let go because of an injury." (A.R. 141)

III. DISABILITY DETERMINATION AND BURDEN OF PROOF

A. Legal Standards

A claimant is disabled if he or she is unable to "engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which . . . has lasted or can be expected to last for a continuous period of not less than 12 months[.]" 42 U.S.C. § 423(d)(1)(A).

"Social Security Regulations set out a five-step sequential process for determining whether an applicant is disabled within the meaning of the Social Security Act." *Keyser v. Commissioner*, ___ F.3d ___, 2011 WL 2138237, at *3 (9th Cir. June 1, 2011) (citing 20

C.F.R. § 404.1520). The Keyser court described the five steps in the process as follows:

> (1) Is the claimant presently working in a substantially gainful activity? (2) Is the claimant's impairment severe? (3) Does the impairment meet or equal one of a list of specific impairments described in the regulations? (4) Is the claimant able to perform any work that he or she has done in the past? and (5) Are there significant numbers of jobs in the national economy that the claimant can perform?

Id. (citing *Tackett v. Apfel*, 180 F.3d 1094, 1098-99 (9th Cir. 1999)); *see Bustamante v. Massanari*, 262 F.3d 949, 953-54 (9th Cir. 2001) (citing 20 C.F.R. §§ 404.1520 (b)-(f) and 416.920 (b)-(f)). The claimant bears the burden of proof for the first four steps in the process. If the claimant fails to meet the burden at any of those four steps, then the claimant is not disabled. *Bustamante*, 262 F.3d at 953-54; *see Bowen v. Yuckert*, 482 U.S. 137, 140-41, 107 S. Ct. 2287, 2291, 96 L. Ed. 2d 119 (1987); 20 C.F.R. §§ 404.1520(g) and 416.920(g) (setting forth general standards for evaluating disability); 404.1566 and 416.966 (describing "work which exists in the national economy"); 416.960(c) (discussing how a claimant's vocational background figures into the disability determination).

The Commissioner bears the burden of proof at step five of the process, where the Commissioner must show the claimant can perform other work that exists in significant numbers in the national economy, "taking into consideration the claimant's residual functional capacity, age, education, and word experience." *Tackett v. Apfel*, 180 F.3d 1094, 1100 (9th Cir. 1999). If the Commissioner fails meet this burden, then the claimant is disabled, but if the

Commissioner proves the claimant is able to perform other work which exists in the national economy, then the claimant is not disabled. *Bustamante*, 262 F.3d at 954 (citing 20 C.F.R. §§ 404.1520(f), 416.920(f); *Tackett*, 180 F.3d at 1098-99).

The ALJ determines the credibility of the medical testimony and also resolves any conflicts in the evidence. *Batson v. Comm'r*, 359 F.3d 1190, 1196 (9th Cir. 2004) (citing *Matney v. Sullivan*, 981 F.2d 1016, 1019 (9th Cir. 1992)). Ordinarily, the ALJ must give greater weight to the opinions of treating physicians, but the ALJ may disregard treating physicians' opinions that are "conclusory, brief, and unsupported by the record as a whole, . . . or by objective medical findings." *Id.* (citing *Matney, supra; Tonapetyan v. Halter*, 242 F.3d 1144, 1149 (9th Cir. 2001)). If the ALJ disregards a treating physician's opinions, "'the ALJ must give specific, legitimate reasons'" for doing so. *Id.* (quoting *Matney*).

The ALJ also determines the credibility of the claimant's testimony regarding his or her symptoms:

> In deciding whether to admit a claimant's subjective symptom testimony, the ALJ must engage in a two-step analysis. *Smolen v. Chater*, 80 F.3d 1273, 1281 (9th Cir. 1996). Under the first step prescribed by *Smolen*, . . . the claimant must produce objective medical evidence of underlying "impairment," and must show that the impairment, or a combination of impairments, "could reasonably be expected to produce pain or other symptoms." *Id.* at 1281-82. If this . . . test is satisfied, and if the ALJ's credibility analysis of the claimant's testimony shows no malingering, then the ALJ may reject the claimant's testimony about severity of symptoms [only] with "specific findings stating clear and convincing reasons for doing so." *Id.* at 1284.

Batson, 359 F.3d at 1196.

B. The ALJ's Decision

The ALJ found that Wilcox was insured through December 31, 2007, and she therefore had to establish disability on or before that date. (A.R. 24, 26) He found Wilcox had not engaged in substantial gainful activity since her amended alleged onset date of October 1, 2005. (A.R. 26) He found Wilcox to have severe impairments consisting of "degenerative disc disease of the lumbar spine, obesity, and affective disorder." (*Id.*) However, he further found that her impairments, singly or in combination, do not meet the Listing level of severity. (A.R. 27)

Regarding Wilcox's mental impairment, the ALJ found Wilcox to have mild restriction in her activities of daily living. He noted she performs "a rather wide range of activities, including meal preparation, watching television, reading, bird watching and embroidery," and "[h]er hygiene and grooming [are] good." (A.R. 28) The ALJ found Wilcox to have mild difficulties in social functioning, and "no interpersonal problems." (*Id.*) She has experienced no episodes of decompensation of an extended duration. (*Id.*) Because Wilcox's mental impairment "does not cause at least two 'marked' limitations or one 'marked' limitation and 'repeated' episodes of decompensation," the ALJ found the criteria of listing 12.04, paragraph B, have not been satisfied. He further found the criteria of listing 12.04, paragraph C, have not been satisfied. (*Id.*)

The ALJ found Wilcox "has the residual functional capacity to perform light work" with the following additional restrictions:

> [T]he claimant is able to perform light work with the ability to lift and carry 20 pounds occasionally and 10 pounds frequently, with

> the ability to push/pull at these same cited levels. The evidence has also convinced the [ALJ] that the claimant is able to sit for 6 hours during the workday and stand/walk for the same length of time during the 8-hour day. Although occasionally able to reach overhead, she cannot bend and lift from floor level on a repetitive basis. Also, the determination is made that the claimant needs to alternate her position during the day from sitting to standing to walking.
>
> The claimant's depression adds non-exertional limitations to her residual functional capacity. . . . [T]he claimant is moderately limited in her ability to carry out detailed instructions and in maintaining attention and concentration for extended periods.

(A.R. 29)

The ALJ found that although Wilcox's "medically determinable impairments could reasonably be expected to produce the alleged symptoms," her testimony regarding "the intensity persistence and limiting effects of these symptoms [was] not entirely credible." (A.R. 31) He noted that after Wilcox's two surgeries in 2001, Dr. Gallo had released her "to work at the light level, full time work, with a change of position and no repetitive bending/twisting at the waist[.]" (*Id.*, citing A.R. 227-28) After Wilcox's slip-and-fall injury in January 2004, the ALJ noted "she underwent a short course of physical therapy and was returned to work with her prior restrictions." (*Id.*, citing A.R. 354) The ALJ cited progress notes from July 2005 through August 2007, indicating Wilcox had benefitted greatly from physical therapy and could sit for longer periods of time, perform housework if she paced herself, walk on her heels and toes, and perform her home exercises. (*Id.*; citations omitted)

The ALJ further found the objective evidence does not support Wilcox's claim that she is disabled due to her depressive disorder. (A.R. 31-32; citing Dr. Joffe's evaluation results from October 2006, A.R. 480-86) The ALJ indicated Wilcox's "numerous activities undercut her allegations of disability," noting that in October 2006, Wilcox's "leisure activities included embroidery, making Barbie clothes for her grandchildren, reading and spending time with friends." (A.R. 32; citation omitted) She also was able to drive a car, and she did two loads of laundry every other day. (*Id.*)

From his review of the evidence, the ALJ reached the following opinion regarding Wilcox's motivation to work:

> The evidence shows that the claimant, although unable to return to her past work, has not returned to any type of employment in the ensuing four years. She has not returned to work even though all the doctors (except Annette Weller, M.D.) concluded that she was able to do so. She settled her worker's compensation claim to go to Lane County Community College [citation omitted], but then reported an alleged slip on a wet floor at the college, dropped out of school, and made no effort to return. She made a lifestyle change and moved to a less stressful environment in the country and reported raising chickens and enjoying life [citation omitted]. The resulting impression is an individual who is uninterested in returning to work or returning to training that supposedly would allow a return to work.

(*Id.*)

The ALJ gave little weight to Dr. Weller's opinion that Wilcox would be unable to maintain a regular work schedule and would miss more than two days of work a month due to pain flareups. The ALJ observed that Dr. Weller "failed to provide any objective findings to support her conclusions," and the doctor's opinion letter was

"generally a recapitulation of what [Wilcox] told this physician." (*Id.*) The ALJ further found that Dr. Weller's conclusions were unsupported even by her own clinical records. (*Id.*) He noted the doctor's notes from May 2005 indicated Wilcox "generally had normal ranges of motion," and her "reflexes were described as normal." *Id.* In the doctor's February 6, 2007, letter, she "cited such normal findings as 5/5 muscle strength throughout the lower extremities," and noted Wilcox "had 45 degrees of flexion in the lumbar spine with 30 degrees of extension, and 20 degrees of side bending to the right and left." (A.R. 32-33) The ALJ concluded that these objective findings did not support Dr. Weller's conclusion that Wilcox could not perform any type of work. (A.R. 33)

The ALJ further gave no weight to Dr. Joffe's conclusion that Wilcox would be unable to maintain a regular work schedule given her physical condition. The ALJ found that "Dr. Joffe, who is a psychologist, was out of her area of expertise in determining physical impairments prevented a return to work. In fact, she was also dabbling in vocational findings, which again is outside her expertise as a psychologist." (A.R. 33)

Regarding the opinions expressed by Steven Wilcox, the ALJ found they did not constitute evidence to show Wilcox is incapable of light work activity with limitations. He also found inconsistencies between Steven's statements and Wilcox's declarations. (*Id.*) He specifically found Steven's statement that Wilcox was unable to do laundry to be inconsistent with Wilcox's representation that she "did two loads of laundry every other day," and Steven's statement that Wilcox "no longer does extensive

walking" to be inconsistent with Wilcox's statement that "she walked a one mile loop around her home." *Id.*

The ALJ found that although Wilcox clearly cannot return to her past work as a bus driver, she retains the residual functional capacity to perform other jobs that exist in significant numbers in the national economy. He relied on the VE's testimony in giving examples of work Wilcox could perform, including small products assembler, parking lot cashier, and "table worker." (A.R. 34)

Because the ALJ found that Wilcox could make a successful adjustment to other work, he found her not to be disabled at any time through the date of his decision (July 26, 2007). (A.R. 34-35)

IV. STANDARD OF REVIEW

The court may set aside a denial of benefits only if the Commissioner's findings are "'not supported by substantial evidence or [are] based on legal error.'" *Bray v. Comm'r*, 554 F.3d 1219, 1222 (9th Cir. 2009) (quoting *Robbins v. Soc. Sec. Admin.*, 466 F.3d 880, 882 (9th Cir. 2006)); *accord Black V. Comm'r*, slip op., 2011 WL 1930418, at *1 (9th Cir. May 20, 2011). Substantial evidence is '"more than a mere scintilla but less than a preponderance; it is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *Id.* (quoting *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995)).

The court "cannot affirm the Commissioner's decision 'simply by isolating a specific quantum of supporting evidence.'" *Holohan v. Massanari*, 246 F.3d 1195, 1201 (9th Cir. 2001) (quoting *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1998)). Instead, the court

must consider the entire record, weighing both the evidence that supports the Commissioner's conclusions, and the evidence that detracts from those conclusions. *Id.* However, if the evidence as a whole can support more than one rational interpretation, the ALJ's decision must be upheld; the court may not substitute its judgment for the ALJ's. *Bray*, 554 F.3d at 1222 (citing *Massachi v. Astrue*, 486 F.3d 1149, 1152 (9th Cir. 2007)).

V. DISCUSSION

Wilcox argues the ALJ erred in five respects, each of which is discussed below.

A. Knee arthritis

Wilcox argues the ALJ erred in failing to include her knee arthritis as a severe impairment. *See* Dkt. #13, p. 13; Dkt. #15, pp. 103. She notes that x-rays of her knee revealed significant osteoarthritic changes, and she complained of severe symptoms to her doctors including "numbness and tingling over the right lateral knee with prolonged sitting for more than ten or fifteen minutes." Dkt. #13, p. 13 (citing A.R. 423).

Wilcox further argues that even if the ALJ considered her knee condition to be accommodated by "the 'sit-stand' option included in the residual functional capacity assessment," *id.*, the ALJ erred in failing to consider her knee condition in finding the medical evidence did not fully support Wilcox's complaints. *Id.* (citing A.R. 31)

The Commissioner argues Wilcox failed in her burden to establish that her knee condition significantly limits her ability

to perform basic work activities, and that the condition lasted for twelve continuous months. Dkt. #14, p. 6. He notes the 2004 x-ray to which Wilcox refers in her brief was not accompanied by any physician's opinion that the osteoarthritic changes in her knee caused any functional limitations. He further argues Wilcox's only other evidence of her knee condition is her subjective reports to Dr. Weller in October 2005 and February 2006. *Id.*, p. 7.

The Commissioner further argues that even if the ALJ failed to find Wilcox's knee condition was "severe," the error was harmless because step two of the sequential evaluation process was resolved in Wilcox's failure. *Id.*, p. 8 (citing *Burch v. Barnhart*, 400 F.3d 676, 682 (9th Cir. 2005)).

The first record evidence of Wilcox's knee problems was a call to Dr. Purvis on November 27, 2001, when she complained of knee pain and wondered if she might have "gout" in her knees. She saw a physical therapist the next day and reported that she had been experiencing knee pain that was limiting her walking somewhat. (A.R. 376, 278) Further therapy notes from this time period do not mention ongoing knee problems.

When Wilcox saw Dr. Purvis in January 2004, after falling at school, she stated she had injured her left knee. Although she had used crutches for a few days, by the time she saw him, two weeks after the fall, she was no longer using the crutches and reported that her pain was subsiding. (A.R. 371) X-rays of her left knee, taken on February 2, 2004, showed "[o]steoarthritic changes . . . in all three compartments, especially severe in the patellofemoral compartment." (A.R. 358) However, again, there are no treatment or physical therapy notes from this time period showing any ongoing

problems with her knee. There is brief mention in Dr. Purvis's progress notes from March 4, 2005, indicating Wilcox had "arthritis in the left knee, which [had] been x-rayed in the past," (A.R. 415), but no indication that he recommended any type of treatment or that her knee problem was interfering with her life.

The only evidence of treatment for knee problems is from October 2005, when Wilcox reported some knee pain after walking at the mall with a friend, and she was noted to be using a cane because her knee wanted to hyperextend. Two physical therapists agreed that Wilcox's knee problem "appear[ed] to be a lax [posterior cruciate ligament] PCL." (A.R. 440) They suggested she obtain a brace to prevent her knee from hyperextending. Dr. Weller prescribed a neoprene sleeve, recommending Wilcox use the sleeve when walking to reduce any further injury. (A.R. 428; *see* A.R. 532-33) Wilcox complained of increased knee pain on December 22, 2005, but she stated it was typical for her to have increased pain in the cold winter months. (A.R. 425)

Although the record contains evidence that Wilcox experienced periodic knee pain, there is no evidence that her knee problems either lasted for twelve continuous months or severely limited her ability to perform basic work activities. The court finds the ALJ did not err in failing to include Wilcox's knee arthritis as a "severe" impairment at step two of the sequential analysis.

However, contrary to the ALJ's conclusion (*see* A.R. 31), the court further finds the medical evidence of Wilcox's knee problems and pain lend credibility to her testimony regarding the intensity, persistence, and limiting effects of her symptoms overall.

B. Credibility analysis

Wilcox argues the ALJ erred in failing to give clear and convincing reasons for rejecting her subjective complaints. Dkt. #13, pp. 14-16; Dkt. #15, pp. 3-5. The Commissioner argues the ALJ did, in fact, give clear and convincing reasons for rejecting Wilcox's subjective complaints. Dkt. #14, pp. 8-11. He argues the ALJ "provided specific findings and articulated clear and convincing reasons for rejecting [Wilcox's] testimony." *Id.*, p. 10 (citing A.R. 30-32).

In finding Wilcox's subjective testimony not to be fully credible, the ALJ relied heavily on the fact that until Wilcox began seeing Dr. Weller in 2005, all of her treating sources eventually had released her to perform light work with some restrictions, and none of them ever opined she would be completely unable to work. However, Wilcox does not allege disability prior to October 2005, so the fact that her treating sources prior to that time had released her to work is not surprising, nor is that fact relevant to the present inquiry. The evidence indicates that each time Wilcox underwent physical therapy, her symptoms improved dramatically, sometimes resolving completely, and she was released from treatment to continue with her home exercises. However, she needed repeated courses of physical therapy on an ongoing basis.

While Wilcox acknowledges that "she has improved each time that she had physical therapy and it brings her through [each] painful episode," she notes that she has continued to complain of "periodic flareups of pain and radiculitis." Dkt. #13, p. 14. The evidence indicates that if Wilcox were required to take time off work for physical therapy upon each flareup of pain, she would be

unable to sustain full-time employment. Similarly, given the amount of time Wilcox spends daily on walking and other forms of exercise, it is unlikely she would be employable in the competitive job market. (*See* A.R. 748-52, VE's testimony)

The ALJ also relied on the fact that after Wilcox's "alleged" fall at school in January 2004, she "made no effort to return," instead making "a lifestyle change and mov[ing] to a less stressful environment in the country and . . . raising chickens and enjoying life." (A.R. 32) The ALJ noted Wilcox had "settled her worker's compensation claim to go to Lane County Community College," but then had made voluntary lifestyle changes and failed to complete her course work. *Id.*

In response, Wilcox testified she attempted to return to school, but she had concerns about her ability to carry her books or pull them on a cart. She reported this fact to Dr. Weller, and stated she was continuing to have "intermittent flare-ups of her pain lasting for up to one week at a time," and her back and leg pain caused her "difficulty walking and occasionally some reduced balance as well." (A.R. 434) Dr. Weller's conclusion that Wilcox had "some persistent findings consistent with a right L5 radiculitis and some dysesthetic pain" (A.R. 437) was supported by her objective examination of Wilcox. Although the ranges of motion in Wilcox's hips, knees, ankles, and lower extremities were within normal limits, ranges of motion in her lumbar spine were not. Standing flexion of the lumbar spine was 35 degrees, with increased pain in the right sacroiliac area; 15 degrees of extension, with 25 degrees being normal; and only five degrees of lateral bending on the left and ten degrees on the right (with 25 degrees being normal

for each side), with increased pain on the right. (A.R. 435) She exhibited reduced sensation to light touch on her right posterior thigh, and reduced pinprick sensation on the right lateral plantar foot and heel. (A.R. 436) These findings are consistent with Wilcox's subjective complaints of back and leg pain that could cause difficulty with walking and occasional reduced balance. The doctor's findings over time also support the conclusions in her opinion letters that Wilcox would be unable to sustain a regular work schedule and likely would miss more than two days of work a month due to pain flareups.

Wilcox's attempt to return to school despite her ongoing symptoms is analogous to a claimant's attempt to return to work despite pain and limitations. The Ninth Circuit has held that a claimant's attempt to work that fails due to ongoing pain and other limitations actually supports a claimant's allegations of disabling pain. *See Lingenfelter v. Astrue*, 504 F.3d 1028, 1038 (9th Cir. 2007) (citing, *inter alia*, *Rosario v. Sullivan*, 875 F. Supp. 142, 146 (E.D.N.Y. 1995) "(holding that substantial evidence did not support the ALJ's decision that claimant was not disabled, in part because claimant's unsuccessful work attempt weighed in favor of a disability finding)"; *Reddick v. Chater*, 157 F.3d 715, 722 (9th Cir. 1998) "('Several courts, including this one, have recognized that disability claimants should not be penalized for attempting to lead normal lives in the face of their limitations.')"). Wilcox's unsuccessful attempt to return to school after her January 2004 injury is additional evidence that she suffered disabling pain. *Id.* In addition, unlike many claimants, Wilcox's treating sources repeatedly noted that she was extremely compliant with all

treatment recommendations and in her home exercise regimen, yet despite her efforts, her condition failed to improve.

The ALJ also noted that Wilcox at times reported she was pain free, and she was walking a mile a day. Both Wilcox and her husband stated Wilcox walked a mile a day on "good days," but there were other days when she walked shorter distances or was unable to walk at all. The Social Security Administration recognizes that a claimant's "'[s]ymptoms may vary in their intensity, persistence, and functional effects, or may worsen or improve with time, and this may explain why the individual does not always allege the same intensity, persistence, or functional effects of his or her symptoms.'" *De Herrera v. Astrue*, 372 Fed. Appx. 771, 775 (9th Cir. 2010) (quoting SSR 96-7p).

Further, the ALJ failed to discuss the side effects of Wilcox's medications, which she indicated cause her to feel lethargic and "drugged feeling," and cause her to have an "abnormal sleep pattern." (A.R. 152) *See Whitehorn v. Astrue*, 321 Fed. Appx. 679, 682 (9th Cir. 2009) (discussing SSR 96-7p, which "sets forth "factors an ALJ may consider when disregarding a claimant's subjective complaints"). The ALJ listed the factors enumerated in SSR 96-7p, *see* A.R. 30, but then failed to acknowledge Wilcox's evidence regarding the side effects of her medications and to address their effects on her ability to work.

The ALJ further relied on Wilcox's "numerous activities," citing her "leisure activities [that] included embroidery, making Barbie clothes for her grandchildren, reading and spending time with friends." (A.R. 32). He also noted she drove a car, and did two loads of laundry every other day. (*Id.*) He found these

activities "undercut [Wilcox's] allegations of disability. (*Id.*; *see* A.R. 31-32). These activities are minimal, and are not inconsistent with Wilcox's claim of disabling pain. Although an ALJ "may reject a claimant's symptom testimony if the claimant is able to spend a substantial part of her day performing household chores or other activities that are transferable to a work setting," a claimant need not "be utterly incapacitated to be eligible for benefits, and many home activities may not be easily transferable to a work environment where it might be impossible to rest periodically or take medication." *Smolen v. Chater*, 80 F.3d 1273, 1284 n.7 (9th Cir. 1996) (citing *Fair v. Bowen*, 885 F.2d 597, 603 (9th Cir. 1989)). Wilcox's daily activities, even on her best days, would not transfer easily into "a work environment where it might be impossible to rest periodically or take medication," *id.*, or allow her to engage in the multiple daily exercises she attempted in order to improve her condition.

The court finds the ALJ erred in failing to provide clear *and convincing* reasons for rejecting Wilcox's subjective testimony regarding her pain and limitations.

C. Rejection of Dr. Weller's opinions

Wilcox argues the ALJ erred in failing to give clear and convincing reasons for rejecting Dr. Weller's opinions regarding her condition and functional limitations. Dr. Weller is Wilcox's treating physician. Therefore, her opinion ordinarily would be entitled to great weight. *Batson*, 359 F.3d at 1195. If the medical opinions differ, then the ALJ must resolve the conflict, giving "'specific, legitimate reasons for disregarding the opinion

of the treating physician.'" *Id.* (quoting *Matney v. Sullivan*, 981 F.2d 1016, 1019 (9th Cir. 1992)). Wilcox argues the ALJ failed to give appropriate reasons for rejecting Dr. Weller's opinions. Dkt. #13, pp. 16-18; Dkt. #15, pp. 6-7.

The Commissioner argues Wilcox has "failed to cite any objective evidence of record that would support Dr. Weller's 2006 and 2007 opinions that she was unable to perform any sustainable work activity." Dkt. #14, p. 11. He notes the doctor's opinions were given in a format that provided "little opportunity for the physician to explain the bases of [her] opinion," a format the Ninth Circuit has held is "entitled to little weight." *Id.* (citing *Crane v. Shalala*, 76 F.3d 251, 253 (9th Cir. 1996)). The ALJ found Dr. Weller's opinions to be conclusory, based on Wilcox's subjective characterization of her symptoms, and unsupported by objective medical findings. *Id.*, pp. 11-12.

The Commissioner observes that Dr. Weller indicated Wilcox would need to change positions frequently, "alternating between sitting and standing and occasionally lying supine." Dkt. #14, p. 12 (citing A.R. 477). However, the Commissioner argues "the ALJ's findings accounted for alternate sitting and standing," (A.R. 29), and the ALJ found Dr. Weller's statement that Wilcox must lie down during the day due to pain to be "unsupported by any evidence in the letter or anywhere in the medical record." Dkt. #14, p. 12.

First, as discussed above, Dr. Weller's treatment notes and objective findings support her diagnosis of Wilcox's ongoing medical problems. Objective findings also supported Wilcox's subjective complaints to the doctor. Second, an ALJ cannot reject a claimant's subjective complaints "solely because the degree of

pain alleged by the claimant is not supported by objective medical evidence." *Bunnell v. Sullivan*, 947 F.2d 341, 347 (9th Cir. 1991). As the Ninth Circuit observed in *Fair v. Bowen*, 885 F.2d 597, 601 (9th Cir. 1989), "[P]ain cannot be objectively verified or measured . . . [and] the very existence of pain is a completely subjective phenomenon. So is the degree of pain." Indeed, it would be difficult, if not impossible, for a physician's objective examination to substantiate a patient's pain level that would require her to lie down periodically throughout the day.

The court finds more persuasive Wilcox's ongoing complaints of pain, which she voiced to Dr. Weller, to Dr. Joffe, and in her hearing testimony. In all these instances, Wilcox stated she often needs to lie down, and lying down is effective in relieving her pain if she can lie down soon after the onset of pain. Wilcox told Dr. Joffe that her need to lie down and rest her back frequently has been present since her accident in 2000. (A.R. 483) There is no substantial evidence in the record to contradict Wilcox's assertion that she needs to lie down from time to time to relieve her pain. Indeed, her testimony on this topic is even more credible when viewed in the light of her extensive efforts to rehabilitate herself, drawing comments about her extraordinary efforts from her treating medical providers. It is far more credible for a person trying to comply with exercise and rehabilitation efforts to develop pain and the need to rest than it is for a person to refuse to participate in such activities based on the complaint that pain prevents them from doing so.

Returning to the ALJ's rejection of Dr. Weller's opinion that Wilcox's back condition "is sufficiently severe that she would be

unable to maintain a regular work schedule and would miss more than two days a month due to flareups of pain" (A.R. 477-78), the court finds the ALJ failed to give specific, *legitimate* reasons for discounting Dr. Weller's opinions. The doctor's opinions are supported by the longitudinal records of Wilcox's care, by objective findings from the doctor's own examinations, and by the testimony of Wilcox and her husband.

D. Consideration of Steven Wilcox's statement

Wilcox argues the ALJ erred in his consideration of her husband's statement. Dkt. #13, pp. 18-19. The Commissioner argues the ALJ's treatment of Steven Wilcox's statement "was reasonable and supported by the record." Dkt. #14, p. 13.

The ALJ indicated he "carefully considered" Steven Wilcox's statement, but he found it to be inconsistent with other evidence of record and not to constitute evidence that Wilcox is incapable of light work. (A.R. 33) The ALJ first noted Steven indicated Wilcox was unable to do laundry, but Wilcox stated she does two loads of laundry every other day. (*Id.*) This is a mischaracterization of Steven's statement. Rather than stating Wilcox was unable to do laundry, Steven stated she could do "limited laundry and cleaning that does not require bending." (A.R. 136) Wilcox similarly stated, in 2004, that she could do "limited laundry and kitchen cleaning, no bending and less than 1/2 hour standing." (A.R. 155) In October 2006, Wilcox told Dr. Joffe that she does two loads of laundry every other day. (A.R. 482) However, she also told Dr. Joffe she is able to "stand for only 30-45 minutes at a time, and then she must either lie down or walk to relieve the

pain in her back and legs." (A.R. 483) The court does not find Steven Wilcox's statement to be inconsistent with Wilcox's declarations.

Second, the ALJ found Steven's statement that Wilcox "no longer does extensive walking" to be "inconsistent with [Wilcox's admission that she walked a one mile loop around her home." (A.R. 33) Again, the ALJ's statement mischaracterizes the evidence of record. Steven stated, in 2004, that Wilcox could walk "1 mile on good days." (A.R. 139) In 2006, Wilcox told Dr. Joffe she "tries" to walk a mile a day, and "[o]n good days, she can walk a mile loop around her house. The other days, she walks to the end of the block and back." (A.R. 482) The court finds these statements to be consistent.

The record evidence is consistent with Steven Wilcox's statements regarding his wife's symptoms and limitations. The court finds the ALJ erred in failing to give adequate weight to this lay evidence.

E. Wilcox's ability to work

Wilcox argues the ALJ erred in concluding she retains the residual functional capacity to sustain competitive work. The court agrees. The record fails to contain substantial evidence to support the ALJ's conclusion, and actually supports the opposite result. Giving Wilcox's and her husband's evidence proper weight, and giving proper weight to the opinions of Wilcox's treating physician, Wilcox clearly could not sustain competitive work on a sustained basis. The VE agreed that none of the job examples he provided would allow an employee the freedom to lie down during the

day, or to take the time necessary to do exercises or take hot baths to relieve pain. The Commissioner's brief argument to the contrary is unavailing. *See* Dkt. #14, p. 14.

VI. CONCLUSION

The Ninth Circuit has made it clear that when the administrative record has been "developed fully and further administrative proceedings would serve no useful purpose, the district court should remand for an immediate award of benefits." *Benecke v. Barnhart*, 379 F.3d 587, 593 (9th Cir. 2004) (citing *Smolen*, 80 F.3d at 1292; *Varney v. Sec'y of Health & Human Servs.*, 859 F.2d 1396, 1399 (9th Cir. 1988)). The *Benecke* court explained:

> More specifically, the district court should credit evidence that was rejected during the administrative process and remand for an immediate award of benefits if (1) the ALJ failed to provide legally sufficient reasons for rejecting the evidence; (2) there are no outstanding issues that must be resolved before a determination of disability can be made; and (3) it is clear from the record that the ALJ would be required to find the claimant disabled were such evidence credited. [Citations omitted.]

Benecke, 379 F.3d at 593; *accord Strauss v. Comm'r*, 635 F.3d 1135, 1138 (9th Cir. 2011). More to the point, the *Benecke* court noted such a case should not be remanded for the sole purpose of allowing the ALJ "to make specific findings regarding excessive pain testimony." *Id.* Instead, the court itself considers the "relevant testimony to be established as true," and remands for an immediate award of benefits. *Id.* (citations omitted).

All three of the *Benecke* factors are present here. The ALJ failed to provide legally sufficient reasons for his rejection of

Dr. Weller's opinion and Steven Wilcox's statement, and for his assessment of Wilcox's credibility. There are no outstanding issues that must be resolved in the case before a disability determination can be made. The court finds it is clear from the evidence of record that if the rejected evidence were credited, as it should be, then the ALJ would be required to find Wilcox disabled.

Accordingly, I recommend the ALJ's decision be reversed and the case be remanded for immediate calculation and award of benefits.

VII. SCHEDULING ORDER

These Findings and Recommendations will be referred to a district judge. Objections, if any, are due by **July 15, 2011.** If no objections are filed, then the Findings and Recommendations will go under advisement on that date. If objections are filed, then any response is due by **August 1, 2011.** By the earlier of the response due date or the date a response is filed, the Findings and Recommendations will go under advisement.

IT IS SO ORDERED.

Dated this 27th day of June, 2011.

/s/ Dennis J. Hubel

Dennis James Hubel
Unites States Magistrate Judge